STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for approval of delivery services tariffs and	:	
tariff revisions and of residential delivery services	:	No. 01-0423
implementation plan, and for approval of certain	:	
other amendments and additions to its rates, terms,	:	
and conditions.	:	

BRIEF ON EXCEPTIONS OF COMMONWEALTH EDISON COMPANY

Paul F. Hanzlik
E. Glenn Rippie
John L. Rogers
John P. Ratnaswamy
FOLEY & LARDNER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

Anastasia M. O'Brien
Anne R. Pramaggiore
Associates General Counsel
Richard M. Bernet
Assistant General Counsel
EXELON BUSINESS SERVICES COMPANY
10 S. Dearborn St.
Suite 3500
Chicago, Illinois 60603
(312) 395-5400

Counsel for
Commonwealth Edison Company

Dated: February 25, 2002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (*cont'd*)

Page

TABLE OF CONTENTS (*cont'd*)

Page

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for approval of delivery services tariffs and tariff revisions and of residential delivery services implementation plan, and for approval of certain other amendments and additions to its rates, terms, and conditions.	:	No. 01-0423

BRIEF ON EXCEPTIONS OF COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company ("ComEd") submits this Brief on Exceptions in accordance with Section 200.830 of the Commission's Rules, 83 Ill. Adm. Code § 200.830, to set forth its exceptions to the Administrative Law Judges' ("ALJs") Proposed Interim Order (the "Order") dated February 8, 2002. In accordance with Section 200.830(b)(2), ComEd is also submitting separate Exceptions, showing in legislative form ComEd's suggested replacement statements and findings. This Brief on Exceptions follows the standard Outline approved by the ALJs, omitting sections to which ComEd takes no substantive exception.

INTRODUCTION

This is the first case in which the Commission will set rates that reflect the actual, historical costs to ComEd, now an energy delivery company, of providing delivery services in an unbundled, competitive market. Only by "getting the price right" here can the Commission both satisfy the requirement of allowing ComEd to recover its reasonable and prudent costs of providing reliable delivery services and meet the goal of continuing to foster the development of an efficient competitive market. Generally speaking, the Order recognizes the objective of approving tariffs that are fair to the utility and that will withstand the tumult of the developing market. But, as discussed in this Brief, several important revisions should be made. As so

revised, the Order will be fair to ComEd and bode well for the future of the competitive market in Illinois.

The reliability of the delivery services infrastructure is fundamental to the efficient function of the market. The delivery services provider is the critical link between energy suppliers and consumers. Since 1999, ComEd has substantially enhanced the reliability of its infrastructure, providing the reliable link required by the new, competitive market. That market has been more vibrant in ComEd's service territory than in any other part of Illinois. The Order, for the most part, recognizes the importance of maintaining that high level of reliability.

By recognizing that ComEd "has met its burden of proving that proposed specific additions to Distribution Plant are used and useful and were built for a reasonable and prudent cost" (Order at 51) and that ComEd "provided sufficient evidence to support its 2000 test year expenses" and "has demonstrated that its expenses were reasonable and appropriate" (Order at 105), the Order provides the necessary basis for the Commission to approve residential delivery services charges to take effect on May 1, 2002. ComEd's agreement to, and support of, the audit procedure adopted in the Order in Docket 01-0664 reflects no doubt about these conclusions. Rather, ComEd is confident that the Order's findings, based on the evidence "at this juncture" (Order at 51-52), will be equally warranted at the end of the audit process.

The Order also reaches correct conclusions as to basic issues that will not be affected by the audit process. This is the first case to set rates for ComEd following ComEd's restructuring of its business as contemplated by the Public Utilities Act (the "Act"). Through this restructuring, the assets and expenses of the Exelon companies have been allocated functionally, so that ComEd retains only those assets and expenses necessary to its operations as an energy delivery company. The Order properly recognizes that in this new world, where ComEd is no

longer an integrated utility, direct assignment of assets and expenses (and secondarily, allocation utilizing more than 30 specific cost-driven allocators) to the delivery function is the preferable methodology, rather than blind adherence to an outdated "one size fits all" labor allocator. ComEd respectfully submits that the arguments for use of the general labor allocator are merely results driven, and that the parties advocating its use are more interested in a substantial reduction of the revenue requirement than they are in getting the price right. The Order correctly recognizes the strength of ComEd's evidence on this point:

> The record in this proceeding shows that the common costs included in ComEd's proposed revenue requirement correctly reflect the actual costs of ComEd's providing jurisdictional delivery services. Where functionalization was required, the evidence supporting ComEd's functionalization of General and Intangible Plant and A & G in this proceeding significantly exceeds not only in quantity but also in scope and nature then [*sic*] that available in Docket No. 99-0117.

(Order at 36).

In this new, unbundled competitive world, it is critical to facilitate the further development of an efficient competitive market by allocating costs to cost-causers as accurately as possible, thereby sending the correct price signals to all market participants. While the Order accomplishes this objective in many respects, some modifications should be made:

- Marginal Cost Rate Design. Rates must show customers correct price signals that reflect the actual costs of their use of the delivery system. The Act requires rates to be cost based. Basing rate design on embedded costs rather than marginal costs, the former of which do not reflect the costs of customer decisions going forward, violates this critical principle and encourages patterns of use that ultimately increase costs for all. Embedded cost methodologies are also less accurate, and thus less fair, in allocating costs to cost-causers. Nonetheless, the Order rejects marginal cost based rates, primarily because the Commission has used embedded cost methodologies in other proceedings. The record in this proceeding overwhelmingly supports the use of marginal cost based rates. This case presents an ideal opportunity for the Commission to establish efficient and truly cost based rates and to reaffirm its support for fairness and economic efficiency.

- Unbundled Service Credits Based on Actual Avoided Costs. The Order errs in basing on average embedded costs, the credits for the avoided use of ComEd's delivery services by unbundled customers taking those services from others. The evidence shows unequivocally that the decision by a given percent of customers to take an unbundled delivery service from another provider reduces ComEd costs by less than a proportionate amount. The Order erroneously chooses a methodology that the record demonstrates will necessarily and unlawfully deny ComEd the opportunity for full cost recovery.

- Fair Cost Recovery for Recent Plant Additions. The Order errs in disallowing certain of the costs of distribution plant placed in service in the second quarter of 2001. ComEd presented uncontradicted evidence of those costs. The Order purports to base this disallowance on ComEd's failure to provide additional documentation "supporting" its sworn testimony, but there was neither a requirement nor a request that ComEd provide such documentation. The disallowance is therefore contrary to law.

- Levelized Recovery of Variable Storm Damage Expenses. The Order should not have rejected ComEd's proposed reserve for variable storm damage expenses. This reserve will dampen the volatility of storm damage expenditures from year to year, and such stabilizing effects will benefit everyone, including customers and other market participants. This reserve will also more easily allow ComEd to maintain sufficient reliability, a critical feature of the developing market. Reconciliations in subsequent rate cases will ensure that there is no over- or under-recovery of the expenses, and in the interim, any unexpended amounts will remain in the reserve account, posing no risk of inappropriate stockholder benefits. The Commission's Staff ("Staff") was the only party that opposed the proposal. Staff's ratemaking objections to the proposal are unfounded and should be rejected.

- Fair Periods for Measuring Storm and Tree Management Expenses. ComEd also takes exception to the Order's adoption of the unrepresentative and unsupported five- and six-year levelization periods for variable storm damage restoration and tree management costs. Use of these lengthy periods unjustly magnifies the downward adjustments to these costs. The evidence strongly favors approval of ComEd's three-year levelization proposal. The Order incorrectly places no weight on the undisputed evidence that ComEd adopted improved storm restoration practices in 1998 and 1999 that have vastly reduced the duration of outages. As customers demand higher levels of service reliability, the Commission should be especially cautious about cutting funding for critical service-related activities like tree management and storm restoration.

- Appropriate Recovery of State Use Taxes. ComEd takes exception to the Order's approval of downward adjustments relating to state use taxes. The evidence demonstrates that the adjustment is unwarranted.

The remainder of this brief will support these and other, less central, exceptions to the Order, supplying suggested replacement language. In many cases, ComEd merely seeks to clarify or complete the Order's descriptions of ComEd's positions on issues; in those cases, the suggested replacement language appears only in the Exceptions. In a few instances (for example, the legal standard for approval of a *pro forma* adjustment), ComEd proposes revisions to conclusions of law, which may appear to be small, but are important, and supports such revisions with citations to relevant authorities and prior Commission orders. As to certain issues on which the Order proposes findings adverse to ComEd (Staff's downward *pro forma* adjustments relating to layoffs and bill payment center closings and most of Staff's downward adjustment relating to "research and development" costs), ComEd raises no exception, though it believes the disallowances were unwarranted. As with the many other adjustments proposed by Staff or by the Governmental and Consumer parties ("GCI") to which ComEd has already agreed in this proceeding, ComEd has concluded that, in the spirit of compromise and in order to narrow the issues, it is willing to forego further contested proceedings on those issues in this Docket.

Finally, given the complexity of the revenue requirement calculations required for resolution of the disputed issues, ComEd has reviewed the numerical calculations included in Appendix A to the Order and reflected in the Findings and Ordering Paragraphs. As a result, ComEd has identified a handful of revisions that should be incorporated in the Post-Exceptions Order, such as corrections to the calculations of the real estate and payroll tax adjustments, so that all of the Order's recommendations in an accurate and complete manner will be implemented. The reasons for those mathematical corrections are explained in more detail in Sections II.A and II.D.3.e.xii of this brief. ComEd also has prepared a corrected Appendix A,

reflecting the rulings made in the Order (but not the exceptions herein), which is appended hereto.

ARGUMENT

I.
Legal Issues and Standards for Decision

A. Substantive Standards and Policies Governing Requested Rates

In Section I.A, on page 9, the Order suggests that *pro forma* adjustments must be proven with "particular certainty." The Commission's prior orders do not hold that proof of *pro forma* adjustments requires "particular" or "absolute" certainty, and instead hold that what is required is only "reasonable level of certainty," "reasonably anticipated," or "reasonably expected." *E.g.*, *In re Central Illinois Public Service Co., et al.*, Commission Docket No. 00-0802, pp. 23-24 (Order December 11, 2001) ("*Ameren*"); *In re Consumers Illinois Water Co.*, Commission Docket No. 97-0351, 1998 Ill. PUC Lexis 479 at *18 (Order June 17, 1998) ("*Consumers*"); *In re Inter-State Water Co.*, Commission Docket No. 85-0166, 1986 Ill. PUC Lexis 27 at *6 (Order February 26, 1986) ("*Inter-State*"); *In re Kankakee Water Co.*, Commission Docket No. 85-0056, 1985 Ill. PUC Lexis 3 at **25, 27 (Order November 26, 1985) ("*Kankakee*").

For example, in *Ameren*, the Commission stated that what was required is "reasonable level of certainty" that a significant known and measurable change, where the amount of the change is determinable, will occur within one year from the filing of the proposed tariffs. *Ameren*, p. 24. In *Consumers*, which involved additions to plant in service and 83 Ill. Adm. Code § 285.150, the Commission also applied the "reasonable certainty" standard. *Consumers*, 1998 Ill. PUC Lexis 479 at *18. Likewise, in *Inter-State*, which involved that same rule, and also involved plant additions, the Commission held:

> Neither Part 285.150 nor the order in Docket 85-0056 indicate that pro forma adjustments should be disallowed merely because they are based upon something less than absolute certainty or that such adjustment would only be proper if the filing requirements or a current or future test year are met. Rather, adjustments should be allowed where they reflect significant changes reasonably anticipated to occur.

Inter-State, 1986 Ill. PUC Lexis at *6. In *Kankakee*, the Commission used "reasonably anticipated" and "reasonably expected" interchangeably. *Kankakee*, 1985 Ill. PUC Lexis 3 at **25, 27.

Because none of the relevant Commission precedent requires "particular certainty," ComEd requests that the second full paragraph on page 9 be amended as follows:

> To be clear, ComEd is entitled to the opportunity to obtain full recovery of its revenue requirement. However, in those instances where the Company through *pro forma* adjustments would seek recovery for out of period costs which are not determinable with ~~particular~~ reasonable certainty, then in those instances we would agree with Staff's concerns and disallow such a recovery.

In addition, in Section I.A, on pages 8-9, the Order discusses Staff's argument that ComEd is not entitled to full recovery of its costs of providing delivery services. That discussion does not expressly address ComEd's responses to Staff's argument. (ComEd Reply Br. at 6-7). The completeness of that discussion would be enhanced by incorporation of a summary of those responses. Suggested language is included in ComEd's Exceptions.

C. Other Policy Issues

1. Impact on Customers

The Order discusses on pages 13-15 ComEd's responses to other parties' positions on the subject of customer impacts. The discussion is not complete without additional language regarding portions of those responses. Suggested language is included in ComEd's Exceptions.

Furthermore, Section I.C.1 of the Order does not contain a separate "Commission Analysis and Conclusion" subsection. Given the number of arguments addressed in that section,

including such a subsection would enhance the completeness of the Order. ComEd therefore requests that the Commission Analysis and Conclusion for Section I.C.1 included in ComEd's Exceptions be inserted immediately after the suggested revised language for that section noted above, after the first full paragraph on page 15.

2. Impact on Cost Based Rates

In Section I.C.2, at pages 15-18, the Order discusses the impact of ComEd's proposal on cost based rates. While the discussion sets forth many of the reasons ComEd's rates are cost-based, the completeness of the discussion would be enhanced by some additional language regarding those reasons. (*E.g.*, Helwig Rebuttal ["Reb."]., ComEd Ex. 19.0, pp. 4:67-9:187, 11:229-45; Helwig, Transcript ["Tr."] 2716:6-2717:7; Hill Reb., ComEd Ex. 23.0 CR, pp. 34:751-35:777; Hill Surrebuttal ["Sur."]., ComEd Ex. 45.0, pp. 22:474-23:513). Suggested language is included in ComEd's Exceptions.

In addition, Section I.C.2 concludes on page 18 that the Act mandates cost based rates, but does not explicitly conclude here that the rates ComEd has proposed are in fact cost based, although the Order does later find in Section I.D on pages 24-25 that the tariffs being approved comply with all of the specific mandates of Sections 16-104 and 16-108 as well as with the "just and reasonable" requirement. The record strongly supports the conclusion that ComEd's proposed rates are cost based. Among other things, ComEd showed that its proposed rates are just and reasonable, and that they are the most accurate and appropriate in assigning costs to cost causers. (*E.g.*, ComEd Init. Br. at 8, 18-21, 29-38). The record demonstrates that ComEd's proposed rates included no imprudent expenditures, are not higher because of past failures, exclude expenses incurred in 1999, voluntarily exclude the part of the 1999 investigation costs that spilled into 2000 (*i.e.*, the Vantage and Liberty reports), and include normalization for tree

management and various storm restoration costs. (*E.g.*, Juracek, Tr. 3378, 3395-97; ComEd Init. Br. at 49-61, 66-71, 90-95). At the same time, no party was able to identify even a single instance of an enhanced, inflated, or escalated cost for any specific plant, substation, or other facility. (*E.g.*, Effron, Tr. 2106; Schlissel, Tr. 2209). The Order acknowledges this when it holds that ComEd "has met its burden of proving that proposed specific additions to Distribution Plant are used and useful and were built for a reasonable and prudent cost" (Order at 51) and that ComEd "has demonstrated that its expenses were reasonable and appropriate" (Order at 105). In addition, the record shows that ComEd's initial proposed revenue requirement and resulting delivery services rates are very reasonable in comparison to other restructured, peer-group utilities around the nation, even before factoring in ComEd's much lower revised proposed revenue requirement. (Juracek Dir., ComEd Ex. 1.0, p. 20). ComEd, therefore, requests that the first two paragraphs on page 18 be revised as suggested in ComEd's Exceptions.

3. Impact on the Development of an Effectively Competitive and Efficient Electricity Market

Section I.C.3 of the Order, on pages 19-20, discusses ComEd's responses to other parties' arguments on the impact of ComEd's proposal on the development of an effectively competitive and efficient electricity market. The completeness of that discussion would be enhanced by inserting the additional language suggested in ComEd's Exceptions regarding portions of those responses that are not now mentioned in such discussion. (*E.g.*, ComEd Init. Br. at 38-39; ComEd Reply Br. at 9).

5. Impact on Capital Markets

ComEd's Exceptions suggest adding language to the first paragraph of Section I.C.5 on page 21 to clarify that Professor Peltzman did not conclude that post-restructuring distribution

utilities are more risky than pre-restructuring integrated electric utilities. Rather, he testified that restructuring added some risks and eliminated others. (Peltzman, Tr. 1568). He concluded that, at this early stage of restructuring, it is not possible to state how the overall risks facing post-restructuring utilities compare to those facing pre-restructuring integrated utilities. (Peltzman Dir., ComEd Ex. 9.0, p. 12:249-54). ComEd's Exceptions also suggest language to clarify that Professor Peltzman did not overlook the importance of the elimination of generation-related risks. He stressed that the "risks associated with owning and operating generation" were removed as a result of restructuring. *Id*.

7. Additional Policy Concerns

Section I.C.7, on pages 23-24 of the Order, under the heading "Other Parties' Positions," does not set forth ComEd's responses to the arguments of the ARES Coalition and IIEC. The Order's completeness and clarity would be enhanced by the suggestions included in ComEd's Exceptions.

II.
Revenue Requirement Issues

A. Calculation of Revenue Requirement

The "Commission Analysis and Conclusion" in Section II.A, on pages 26-27, should be amended in a two respects. First, it should expressly reject the ARES Coalition's request to spread out any rate increase over five years. The ARES' request would be contrary to, among other things, the Act's requirements that rates be cost based and provide for full cost recovery. 220 ILCS 5/16-108(c). Second, the stated numerical revenue requirement of $1,649,844,000 should be amended to reflect corrected calculations in the Appendix A to the Order from which that value is derived. Given the rulings made in the Order, the mathematically correct revenue

requirement is $1,657,604,000. If ComEd's Exceptions are accepted, the mathematically correct revenue requirement is $1,670,739,000.[†] Accordingly, the carryover paragraph on pages 26-27 should be modified as suggested in ComEd's Exceptions.

Also, the discussion, at pages 25-27, of ComEd's initial and revised proposed revenue requirements does not fully describe the extensive and detailed evidence submitted in favor of both ComEd's initial and revised figures. The Order should by augmented with the additional description of that evidence set forth in ComEd's Exceptions.

C. Rate Base

2. General and Intangible Plant -- Direct Assignment and Allocation

On pages 29-30 and 36, the Order discusses ComEd's positions regarding the accounting for General and Intangible Plant and its responses to other parties' arguments for use of various alternative labor allocators to allocate those costs. In light especially of the discussion on pages 30-35 regarding Staff's arguments, as well as other parties' arguments, such as the ARES Coalition's spurious arguments regarding CBMS, the completeness and clarity of the Order would be enhanced by further discussion and updating of ComEd's responses. (ComEd Init. Br. at 17-18, 43-45; ComEd Reply Br. at 13-22; *see also* ComEd Init. Br. at 63-65 (A&G expenses); ComEd Reply Br. at 42-44 (same)).

ComEd accordingly requests that the first two full paragraphs on page 36 be amended and supplemented as follows:

> ComEd contends that it proved the accuracy of its General and Intangible

[†] ComEd has provided a corrected Appendix A, which is attached to this brief as Attachment A which is otherwise identical to that attached to the Order, but that correctly accounts for the resolution of the A&G expense labor allocator issue, and the amounts of the adjustments for the real estate tax accrual true-up, payroll taxes, and state use taxes. This corrected Appendix A reflects only the above corrections based on the rulings recommended in the Order and not any of ComEd's exceptions herein.

Plant costs included in jurisdictional rate base. ComEd argues that in direct and surrebuttal, Company witness Hill went through each individual General and Intangible Plant account, showing ComEd had analyzed them correctly. ComEd also argues that no party identified even a single flaw in ComEd's analysis. ComEd also contends that Staff's claims of inconsistencies are incorrect, as shown in Mr. Hill's pre-filed testimony and again in Mr. Hill's redirect testimony, and reflect only misunderstanding on Staff's part. ComEd further contends that; no party identified any General or Intangible Plant cost that ComEd directly assigned that is not amenable to direct assignment; the Intangible Plant costs, for example, consist of only five items, typically major software systems;, supported by specific detailed evidence, and no party even attempted to discuss those items as such. As discussed above, given that the restructured balance sheets addressed all assets and liabilities, including General and Intangible Plant, direct assignment and allocation were necessary only in two limited areas. Where allocators were used, they were appropriate allocators based on cost causation. ComEd notes that Staff and IIEC mention executive compensation and costs of corporate offices, which are A&G expenses, not General and Intangible Plant costs, and which ComEd did not directly assign but rather allocated using the same labor allocator proposed by GCI and IIEC, as discussed in Section II.D.3.b of this Order.

Staff's assertion that the restructuring did not begin until 2001 simply is incorrect -- it began in Fall 2000, during the test year (as noted above). Staff's assertion that the restructuring penalizes delivery services customers is unsupported and circular -- Staff assumes without proof that Staff's allocator is correct and then assumes that if the restructured balance sheets do not match the results of the Staff's allocator then the balance sheets must be incorrect. Staff's position also is inconsistent with its position in Docket 00-0802, where Staff insisted on a *pro forma* adjustment to reflect the sale of generation after the test year, and the Commission approved that adjustment. Staff's position also is inconsistent with its argument in Docket 01-0530 that its proposed labor allocator should not be rejected based on its results compared with its results in a prior rate case. Also, Staff's witnesses testified in Docket 99-0117 that ComEd's functionalization of General and Intangible Plant was reasonable and should be adopted, and, in the instant Docket, Staff witness Bowers criticized allocation where direct assignment is feasible.

IIEC's position is inconsistent with its position in Docket 01-0432, where it opposes use of the labor allocator for functionalization in light of its results given IP's restructuring. Further, ComEd witness Alan Heintz, former Section Chief of FERC's Division of Applications, refuted IIEC's claims that FERC decisions and prior ComEd bundled rate case decisions support use of a labor allocator here.

ComEd also notes that the record in this Docket is a new evidentiary record, vastly different from the record in Docket 99-0117, and that the decision in that Docket is not *res judicata.* ComEd now is a vastly different company from the one it was in that Docket. ComEd then was a vertically integrated electric

utility. It owned numerous fossil generating plants and the nation's largest nuclear fleet. ComEd sold its fossil units before the 2000 test year, ComEd has been restructured beginning in Fall 2000, with restructured balance sheets reviewed by its independent auditor, and the facts differ substantially from those in Docket 99-0117. ComEd's restructuring profoundly affected its costs; for example, in 1999 when it was a vertically integrated utility its fossil production expenses were 21.3% of its O&M expenses, but in 2000 they were just 0.16% of those expenses. All data supporting the split balance sheets, including the General and Intangible Plant accounts, were *available* to the parties for several months. Further, the Commission did not use a labor allocator for Intangible Plant in Docket 99-0117. Moreover, ComEd notes, on rehearing in that docket and in Docket 99-0113 the Commission made clear that direct assignment is preferable because it is more accurate where it is feasible.

ComEd disputes the ARES Coalition's purported suspicions about CBMS noting that CBMS is, and has been since January 1, 1998, ComEd's general ledger. CBMS, therefore, has been reviewed three times by ~~the~~ ComEd's independent auditors not even counting interim audit procedures, ~~it is ComEd's general ledger,~~ the workpapers of the independent auditor review were available to Staff during its field audit and Staff has raised no issue regarding the integrity of CBMS, Staff was given a presentation on CBMS and had every opportunity to obtain data from CBMS, and the ARES Coalition's assertions are not supported by the evidence.

3. Known & Measurable Changes to Test Year Plant Balances

On page 40, the Order disallows $11,038,000 (gross amount) of ComEd's $126,592,000 (gross amount; the net amount is $122,765,000) *pro forma* adjustment for a portion of the distribution plant that was reasonably expected to be placed in service and serving retail customers in the second quarter of 2001. The Order states:

> The Commission concludes that Staff's adjustments to ComEd's proposed $122,765,000 in distribution plant that was reasonably expected to be (and in fact ultimately was) placed in service and serving retail customers in the second quarter of 2001, along with the associated adjustments for accumulated depreciation, accumulated deferred income taxes and depreciation expense, is appropriate. While the Commission acknowledges that the Company is entitled to seek upward pro forma adjustments for all rate base additions reasonably expected to be placed in service and serving customers on or before the date of the Commission's order in this proceeding, or within 12 months of the initiation of this proceeding, that does not mean the Company is given carte blanche. The Company does bear the responsibility of providing supporting documentation for

> the additional expenditures that it now seeks to recover. The Company was aware of Staff's data request and at one point did correct or supplement its response. The Company failed to further correct or supplement its response. As such the Company chose at its own peril to rely simply on the testimony of Mr. Voltz to support an $8,000,000 additional expenditure as well as speculation for over $3,000,000 in future expenditures. The lack of supporting information is patent. We agree with Staff that the Company should have provided supporting documentation and rationale as to why additional expenditures had been made and why more may be necessary later.

(Order at 40). This is both error as a matter of law and contrary to the record evidence.

It is undisputed -- and the Order acknowledges -- that ComEd legally is entitled to seek upward *pro forma* adjustments for all rate base additions reasonably expected to be placed in service and serving customers on or before the date of the Commission's order in this proceeding, or within twelve months of the initiation of this proceeding. *E.g., In re Consumers Illinois Water Co.,* No. 97-0351, 1998 Ill. PUC Lexis 479 at *45-48 (Order June 17, 1998). This proceeding was filed on June 1, 2001. Yet, ComEd's *pro forma* adjustment is very conservative in seeking to recover only a portion of the distribution plant actually placed in service and serving customers in the first and second quarters of 2001. (Voltz Dir., ComEd Ex. 5.0, pp. 7:136-14:300, 15:317-16:330; ComEd Exs. 5.2-5.3; Hill Dir., ComEd Ex. 4.0 CR, pp. 23:475-24:503 and Att. C, Schs. B-2.1, B-2.2). Moreover, ComEd proposed no such adjustment for the third and fourth quarters of 2001 or for any period in 2002, even though ComEd continues and will continue to make such distribution plant additions. (Voltz Dir., ComEd Ex. 5.0, pp. 11:237-12:247, 12:260-13:265, 13:279-14:297; Helwig Reb., ComEd Ex. 19.0, pp. 3:45-55, 9:193-11:228 and ComEd Exs. 19.1 - 19.2).

It also is undisputed, as the Order again expressly confirms, that all of the distribution plant at issue was <u>in fact</u> placed in service in the second quarter of 2001. Thus, the only issue that could even theoretically be disputed is the reasonably expected cost of the projects at issue. However, there is no such legitimate dispute.

ComEd submitted uncontradicted evidence of the reasonably expected aggregate cost of $126,592,000 for the distribution plant at issue. (Voltz Dir., ComEd Ex. 5.0, pp. 7:136-14:300, 15:317-16:330; ComEd Exs. 5.2-5.3; *accord* Hill Dir., ComEd Ex. 4.0 CR, pp. 23:475-24:503 and Att. C, Schs. B-2.1, B-2.2). The $126,592,000 figure was based on the reasonably estimated final asset value (costs incurred and paid) of those projects, with ComEd noting that, as of April 30, 2001 -- the latest data then available -- ComEd had actually incurred and paid $98,633,000 for the projects. (Voltz Dir., ComEd Ex. 5.0, pp. 13:269-14:300 and ComEd Ex. 5.3). Once ComEd made a *prima facie* case as to its *pro forma* adjustment, as it plainly did, the burden of going forward with the evidence shifted to any party opposing the adjustment. *City of Chicago v. People of Cook County*, 133 Ill. App. 3d 435, 442-43, 478 N.E.2d 1369, 1375 (1st Dist. 1985). (*See also* ComEd Init. Br. at 50 and n.† (additional discussion and citations). However, no party submitted any evidence that ComEd would not incur that aggregate cost of $126,592,000, or that it was excessive.

Indeed, only GCI contested any part of ComEd's *pro forma* adjustment in their direct testimony. GCI proposed the partial disallowance of $11,038,000 based on the fact that ComEd had stated, in its corrected response to Staff data request GEG-1.01, that ComEd had expended or incurred $115,554,000 ($11,038,000 less than the proposed adjustment of $126,592,000) for the projects at issue through June 30, 2001. (Effron Dir., GCI Ex. 2.0, pp. 35:15-36:9; GCI Ex. 2.1, Sch. DJE-6.1). GCI's witness argued that: "The Company should not be allowed to earn a return on investments that it has not made" (Effron Dir., GCI Ex. 2.0, p. 35:22-23), in effect objecting to any *pro forma* adjustments for investments not yet made, no matter how certain. This is clearly contrary to the law as stated in the Order. Staff also fails to justify the partial disallowance. It was not until rebuttal testimony, filed on October 16, 2001, that Staff first

supported this partial disallowance, and Staff's witness simply adopted GCI's erroneous argument. (Gorniak Reb., Staff Ex. 15.0 CR, p. 3:47-62).

The attempt to cut short ComEd's *pro forma* adjustment is erroneous, for several reasons. As noted above, ComEd legally is entitled to seek *pro forma* adjustments for all rate base additions reasonably expected to be placed in service and serving customers on or before the date of the Commission's order in this proceeding, or within 12 months of the initiation of this proceeding. *Consumers*, 1998 Ill. PUC Lexis 479 at *45-48; 220 ILCS 5/9-214(e). GCI's argument assumes, incorrectly, that the adjustment is limited to amounts expended or incurred as of June 30, 2001 -- only 29 days after the initiation of this proceeding. Not only is that argument contrary to the law and the Commission's prior decisions, as shown above, but it is antithetical to the very reason that such an adjustment is authorized. The purpose of this type of adjustment is to capture, at least in part, certain capital expenditures reasonably expected to occur between the filing of a rate case and the effective date of the new tariffs filed effective after entry of the Commission's order. That is just and reasonable. In contrast, the arbitrary constraint that GCI's argument seeks to impose would deny utilities a return on a significant amount of investment -- capital expenditures made during a rate case for plant that is reasonably expected to be used by customers as of the time when the proposed rates go into effect. The cross-examination of GCI's witness confirmed that its choice of a 29-day cutoff is entirely arbitrary. (Effron, Tr. 2093-97).

In any event, ComEd, in the surrebuttal testimony of Philip Voltz filed on October 24, 2001, presented uncontradicted evidence that, as of the latest date for which data were then available, September 30, 2001, ComEd actually had incurred and paid $123,680,000 for the projects at issue, and that because trailing expenditures on some of the projects would continue, the original figure of $126,592,000 for the adjustment remained appropriate. (Voltz Sur.,

ComEd Ex. 46.0, p. 2:26-42). Mr. Voltz's direct testimony regarding ComEd's reasonably expected costs for the projects at issue, and his surrebuttal testimony regarding the actual capital costs for these projects through September 2001 and their reasonably expected trailing capital costs, are uncontradicted. Indeed, neither GCI nor Staff even cross-examined Mr. Voltz on this subject. Mr. Voltz's testimony on this subject contains no inherent improbability, nor has it been impeached, and thus it must be accepted. *Bazydlo v. Volant*, 164 Ill. 2d 207, 215, 647 N.E.2d 273, 277 (1995). "While an administrative agency's findings of fact are considered *prima facie* correct, they must still be based on the evidence, and the agency as fact finder simply cannot disregard the testimony of an unimpeached witness where the testimony is uncontradicted and is not inherently improbable." *Thigpen v. Retirement Bd. of Fireman's Annuity and Benefit Fund of Chicago*, 317 Ill. App. 3d 1010, 1021, 741 N.E.2d 276, 284-85 (1st Dist. 2000) (*citing Trahraeg Holding Corp. v. Property Tax Appeal Bd.*, 204 Ill. App. 3d 41, 44, 561 N.E.2d 1298, 1300 (2d Dist. 1990)).

Any assumption or innuendo by Staff or GCI that there is anything improper or even uncommon about a utility incurring trailing capital costs for a distribution facility once the facility is placed in service is unsupported, illogical and, as proved in this instance, incorrect. Indeed, the idea that all of the costs of any major distribution capital project will not only be incurred and invoiced, but paid, in advance or no later than the moment when the facility is energized, simply is not plausible on its face. That idea is nothing more than unfounded speculation. It is unlawful for the Commission to disallow ComEd's proven costs on the basis of speculation. *E.g., Peoples Gas Light & Coke Co. v. Slattery*, 373 Ill. 31, 61, 25 N.E.2d 482, 497 (1940). *See also, e.g., Ameropan Oil Corp. v. Illinois Commerce Comm'n*, 298 Ill. App. 3d 341, 348, 698 N.E.2d 582, 587 (1st Dist. 1998) ("speculation has no place in the ICC's decision or in

our review of it"); *Allied Delivery System, Inc. v. Illinois Commerce Comm'n*, 93 Ill. App. 3d 656, 667, 417 N.E.2d 777, 785 (1st Dist. 1981) ("The speculation indulged in by the Commission is clearly an unsatisfactory and unacceptable basis for its decision.").

Unable to impose the 29-day cutoff or refute Mr. Voltz's testimony, Staff, at the post-hearing briefing stage, argued that ComEd was obligated to provide specific types of additional documents to support Mr. Voltz's unrebutted testimony, even though neither GCI nor Staff cross-examined him on this subject or attacked his credibility. (Staff Init. Br. at 21; Staff Reply Br. at 7-8). Staff's argument and attack are unwarranted, unfair, and incorrect, for several reasons.

First, it should be remembered that the "issue" of ComEd's proof of how much it expended or incurred for the projects at issue after June 30, 2001, is not the real issue under the law or the Commission's prior orders. ComEd's burden was to prove the reasonably expected costs of the projects at issue, not to prove how much it in fact had expended or incurred on these projects as of June 30, 2001, or as of any other date during the rate case. ComEd met that burden. No party submitted any contrary evidence. Thus, ComEd was entitled to the entire adjustment even before it submitted Mr. Voltz's surrebuttal testimony.

Staff's argument -- which the Order expressly adopts -- that Mr. Voltz's surrebuttal testimony as to costs already incurred or paid is insufficient because it is not corroborated supported by other documentation, is not supported by any legal authority and plainly is unlawful. That argument parallels and even goes beyond (by virtue of the attempted extension to actual costs) the Commission rulings regarding the alleged insufficiency of sworn testimony to prove expected costs that were reversed by the Appellate Court in the appeals from Docket Nos. 99-0117 and 99-0013. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 322 Ill.

App. 3d 846, 751 N.E.2d 196 (2d Dist. 2001); *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, No. 2-00-1397 (Ill. App. Ct. 2d Dist., October 11, 2001).†

Further, Staff's complaint that Mr. Voltz made a "sudden claim" that capital costs were incurred or expended on the projects at issue from July through September 2001 in his surrebuttal filed on October 24, 2001 (*e.g.*, Staff Init. Br. at 21) is erroneous and unfair. Staff overlooks that the original figure for the capital costs reasonably expected to be incurred for those projects is entirely consistent with Mr. Voltz's surrebuttal testimony and included expenses beyond the date of prior testimony. It overlooks that the figure for capital costs actually expended or incurred through September 2001 obviously could not have been included in ComEd's rebuttal testimony filed on September 20, 2001. And, as noted above, it overlooks that Staff itself first advocated the partial disallowance in its rebuttal testimony filed on October 16, 2001, just eight days before ComEd filed its surrebuttal testimony.

Staff's remaining theory -- that because ComEd provided additional information regarding actual costs expended or incurred on the projects at issue through September 2001 in sworn surrebuttal testimony, but did not also supplement the response to Staff data request GEG-1.01 with the exact same data, ComEd should be denied inclusion of the $11,038,000 in its rate base -- is punitive, unreasonable, and unfair on its face, especially given the chronology set forth above. Indeed, Staff and GCI do not, and cannot, claim that Staff data request GEG-1.01 requested any documentation of the costs at issue. Thus, had ComEd supplemented its response to Staff data request GEG-1.01 with the figure for capital costs actually expended or incurred on those projects through September 2001, in the very short period between when that data became available and when ComEd filed its surrebuttal testimony, ComEd's supplementation would

† Although said decision is unpublished, it may be cited here under Ill. S. Ct. R. 23(e). A genuine copy of the opinion is attached at Attachment B hereto.

have been nothing more than providing the very same figure that it provided in its surrebuttal testimony or, at most, that very same figure plus updated individual figures for each of the individual projects. In other words, what Staff really is suggesting is that the Commission should disallow $11,038,000 of undeniably used and useful plant actually in service because ComEd, while it did provide sworn testimony of those costs, did not also provide other corroborating documentation that it was not required, or asked, to provide. That is contrary to the law and to the evidence in the record, and it is neither just nor reasonable. The Order, therefore, errs by not approving ComEd's entire $126,592,000 *pro forma* adjustment.

ComEd accordingly requests that the first full paragraph of page 40 of the Order be amended to read as follows:

> The Commission concludes that GCI's and Staff's $11,038,000 (gross amount) adjustments to ComEd's proposed $122,765,000 (net amount) (gross amount $126,592,000) *pro forma* adjustment for certain distribution plant that was reasonably expected to be (and in fact ultimately was) placed in service and serving retail customers in the second quarter of 2001, along with the associated adjustments for accumulated depreciation, accumulated deferred income taxes and depreciation expense, is inappropriate. While the Commission acknowledges that the Company is entitled to seek upward pro forma adjustments for all rate base additions reasonably expected to be placed in service and serving customers on or before the date of the Commission's order in this proceeding, or within 12 months of the initiation of this proceeding, that does not mean the Company is given carte blanche. However, ComEd provided uncontradicted evidence of its reasonably expected costs, as well as of its actual costs expended and incurred through June 2001 and through September 2001. There is nothing inherently improbable in that evidence, nor was it impeached. While it may have been preferable for ComEd to provide further documentation, it was not required to do so, and on the record here it would not be just and reasonable to disallow any of ComEd's costs on that basis.

In the alternative, even assuming that a partial disallowance had been warranted, which it was not, the Order errs by approving a disallowance of $11,038,000 rather that a disallowance of $2,912,000 (gross amount), *i.e.*, the difference between the $126,592,000 figure and the $123,680,000 that ComEd in fact incurred or expended on the projects at issue through

September 2001. Under this alternative, ComEd accordingly would request that the first full paragraph of page 40 of the Order be amended to read as follows:

> The Commission concludes that GCI's and Staff's $11,038,000 (gross amount) adjustments to ComEd's proposed $122,765,000 (net amount) (gross amount $126,592,000) *pro forma* adjustment for certain distribution plant that was reasonably expected to be (and in fact ultimately was) placed in service and serving retail customers in the second quarter of 2001, along with the associated adjustments for accumulated depreciation, accumulated deferred income taxes and depreciation expense, is inappropriate, but that a disallowance of $2,912,000 (gross amount) is warranted. While the Commission acknowledges that the Company is entitled to seek upward pro forma adjustments for all rate base additions reasonably expected to be placed in service and serving customers on or before the date of the Commission's order in this proceeding, or within 12 months of the initiation of this proceeding, that does not mean the Company is given carte blanche. ComEd provided uncontradicted evidence of $123,680,000 of actual costs expended and incurred on the projects at issue through September 2001. There is nothing inherently improbable in that evidence, nor was it impeached. While it may have been preferable for ComEd to provide further documentation of its actual costs, it was not required to do so, and on the record here it would not be just and reasonable to disallow any of ComEd's actual costs on that basis. The difference between that figure and ComEd's requested adjustment is $2,912,000.

5. Accumulated Deferred Income Taxes

Page 41 of the Order appropriately approves five adjustments to Accumulated Deferred Income Taxes ("ADIT") agreed to by ComEd. However, on page 41 the remaining proposed adjustments to ADIT are not expressly denied, even though the reasons mandating such denial are stated on pages 36-37 and 52 of the Order. The second full paragraph on page 41 should, therefore, be amended as set forth in ComEd's Exceptions.

6. Plant Adjustments

d. Accumulated Depreciation Adjustment Related to Overtime and Alleged Premiums Paid

Page 43 of the Order states in part:

> In the event the overtime and alleged premiums (or portions thereto) are found to be imprudent then in that event the Commission concludes that adjustments will

> be warranted. Further, if adjustments are warranted then in that event, the Commission finds that Staff's deprecation rate is proper and is based upon the best information available. The Company failed to provide with any specificity, an alternative or composite depreciation rate.

While the Order correctly rejects Staff's overtime and "premiums" adjustments, it errs in concluding that were such adjustments adopted, then Staff's depreciation rate would be appropriate because ComEd "failed to provide with any specificity, an alternative or composite depreciation rate." Indeed, Staff derives its rate from data provided by ComEd. Moreover, the Order itself demonstrates that appropriate composite or average depreciation rates are readily derived from data ComEd provided for each of three periods: the second quarter of 2001, the first quarter of 2001, and 2000.

ComEd has taken exception to partial disallowance of $11,038,000 from ComEd's *pro forma* adjustment for certain distribution plant added in the second quarter of 2001. (*See* Section II.C.3, *supra*). Assuming, *arguendo*, that the partial disallowance were valid (which it is not), then the annual amount of depreciation for the disallowance would be, as Staff calculated, $277,000. (Order, App. A, Sch. 2, p. 4; Gorniak Reb., Staff Ex. 15.0 CR, Staff Ex. 15.1). Staff determined that $277,000 figure by weighting the 2.4% depreciation rate for high voltage distribution plant and the 3.6% depreciation rate for non-high voltage distribution plant based on the respective amounts of plant included in the *pro forma* adjustment to arrive at a composite depreciation rate of 2.55%. (Gorniak Reb., Staff Ex. 15.0 CR, Staff Ex. 15.1; Hill Dir., ComEd Ex. 4.0 CR, App. C, Sch. B-2.2, p. 2). This approach is appropriate, in the absence of more specific data, as to any particular plant at issue.[†] Similar data regarding the respective amounts of high - and non-high-voltage distribution plant exists in the record as to the distribution plant

[†] Appropriate changes to reflect the ADIT would also be required. (Hill Sur., ComEd Ex. 45.0, pp. 35:743-36:778).

added in the other relevant periods. (Hill Dir., ComEd Ex. 4.0 CR, App. C, Sch. B-2.2, p. 1; Hill Sur., ComEd Ex. 45.0, p. 35:743-~~7~~66). Thus, there is sufficient evidence in the record to generate an appropriate composite or average depreciation rate as to additions or downward adjustments to distribution plant for each of those three periods. Accordingly, a short "ComEd's response" section should be added as the third full paragraph on page 43, and the relevant portion of the current third full paragraph on page 43 should be amended as stated in ComEd's Exceptions.

e. Accumulated Deferred Taxes Adjustment Related to Overtime and Alleged Premiums Paid

The Order errs here for the same reasons as in Section II.C.6.d. (*See* Section II.C.6.d, *supra*). Replacement language is included in ComEd's Exceptions.

7. Prudence of Distribution Capital Investment Costs

a. Effect of Alleged Imprudence on Rates

The Order contains several incorrect statements regarding the effect of imprudence -- should any be demonstrated after the audit -- on rates. The discussion on page 47 incompletely and, therefore, inaccurately sets forth the applicable legal standard and contains a typographical error that results in a substantive error.

A finding that a utility acted imprudently with regard to capital projects, standing alone, does not justify a disallowance of any capital costs. When imprudence is found, the essential questions are whether, and, if so, to what extent, that imprudence resulted in an incremental increase in the utility's capital costs, over a prudent amount, that should be disallowed. *E.g.*, *In re Central Illinois Gas Co.*, No. 94-0040, 1994 Ill. PUC Lexis 577 at *40 (Order Dec. 12, 1994) ("[D]isallowances should be imposed only to the extent that the expenses and investment exceed

the levels that would have been incurred absent imprudence on the part of CILCO."). Indeed, as the Order expressly recognizes: "Should the audit disclose that mismanagement or neglect by the Company to its distribution system attributed to a quantifiable incremental cost included in ComEd's proposed revenue requirement that would not have been incurred 'but for' ComEd's alleged past management, an adjustment such as the one proposed by Staff would be warranted." (Order at 47).

Moreover, it is fundamental that net rate base is determined on a cumulative basis, not a test year basis, *i.e.*, net rate base is not the investment in the test year, but the cumulative net investment as of the test year, subject to any appropriate *pro forma* adjustments. (*E.g.*, Hill Sup. Reb., ComEd Ex. 38.0 CR, pp. 4:74-5:110; Helwig Reb., ComEd Ex. 19.0, pp. 5:109-6:116; Bodmer, Tr. 1833:9-1834:1). This principle it is not disputed by any party in this proceeding. Thus, because distribution plant investments are depreciated over decades -- about 30 and 40 years, respectively, for low/medium- and high-voltage distribution plant (*e.g.*, Hill Dir., ComEd Ex. 4.0 CR, App. C, Sch. B-2.1) -- even if any of the distribution plant investments at issue had been made a year or even several years earlier, the investment still would be in the rate base for this proceeding. (*E.g.*, Helwig Reb., ComEd Ex. 19.0, pp. 6:130-7:138). While earlier installation would have started depreciation earlier, so, too, would have ComEd's recovery of its investment. The distribution plant, depending on the exact timing, would have been included in net rate base in one or more prior ComEd rate cases, including Docket No. 99-0117. Customers, therefore, have saved the "time value of money" to the extent that investment occurred later rather than earlier. (*E.g.*, Helwig Reb., ComEd Ex. 19.0, pp. 6:130-7:138).[†] Similarly, if ComEd

[†] Staff witness Larson challenged ComEd's use of overtime labor on some capital projects, theorizing that they could have been performed earlier and that, if they were, ComEd could have used less overtime, lowering its labor costs. (Larson Dir., Staff Ex. 9.0, p. 8:259-63). While these are reasonable questions, the uncontradicted evidence showed that ComEd's work force already was working on overtime in the

had completed any of the significant "accelerated" distribution capital projects over a longer period, then, regardless of when started, they would have accrued a greater Allowance for Funds Used During Construction ("AFUDC"), thereby increasing the total allowable costs of such projects. (Larson, Tr. 2101:10-2106:1; Bodmer, Tr. 1874:21-1875:14).

In sum, even setting aside the absence of proof of imprudence, no party has shown that the alleged imprudence of not installing some distribution capital projects earlier has had any incremental impact on ComEd's net rate base, much less an increase over a prudent amount. Thus, the first full paragraph and the last sentence of the second paragraph on page 47 should be amended as follows:

> The Commission ~~rejects the Company's position that it makes no difference when capital investments are made.~~ recognizes that ComEd has shown that, if recent distribution capital projects included in ComEd's rate base had been performed earlier, or over a longer period, then that would not necessarily have resulted in any decrease in ComEd's net rate base in this proceeding, and, depending on the timing, might or might not have resulted in higher charges being set in prior rate cases.~~Further, the Commission rejects the notion that the Company would simply have incurred costs earlier had they made they performed certain work sooner.~~
>
> * * * * *
>
> Should the audit disclose that imprudent mismanagement or neglect by the Company to its distribution system attributed to a quantifiable incremental cost included in ComEd's proposed revenue requirement over what is prudent that would not have been incurred "but for" ComEd's alleged past imprudent mismanagement, an adjustment such as the one proposed by Staff would be warranted.

b. Prudence of Specific Distribution Capital Investments in Rate Base

Pages 50-51 of the Order summarize ComEd's responses to certain arguments on the subject of the prudence of its distribution plant additions. The completeness of that discussion

---

years preceding the test year, and, moreover, that hiring and training new employees instead of using overtime would not, in fact, have been more cost-effective. (Voltz Reb., ComEd Ex. 24.0 CR, pp. 3:43-4:70; Williams Reb., ComEd Ex. 25.0 CR, p. 5:100-08).

would be enhanced by the brief supplementation in ComEd's Exceptions. (*E.g.*, ComEd Reply Br. at 5, 37-38).

In addition, page 52 of the Order states that: "Should the audit disclose that certain costs associated with the specific additions to Distribution Plant were as a result of mismanagement or neglect by the Company, adjustments would be warranted." That sentence is less precise than the parallel sentence on page 47 of the Order, which itself incompletely sets forth the applicable legal standard and contains a typographical error that results in a substantive error. (*See* Section II.C.7.a, *supra*). Thus, ComEd asks that the above sentence be modified to read: "Should the audit disclose that certain quantifiable incremental costs associated with the specific additions to Distribution Plant over a prudent amount were as a result of imprudent mismanagement or neglect by the Company then, as discussed in Section II.C.7.a of this Order, adjustments would be warranted."

D. Operating Revenues and Expenses

Page 52 of the Order states in part: "Staff's net downward adjustments of $60,002,000 are largely based on its proposal to use what ComEd labels a crude, less accurate general labor allocator to apportion A&G and general plant expense. ComEd indicates that its revised proposal is only 4.82% higher than Staff's revised proposed jurisdictional operating expenses of $1,183,234,000." Those statements, due apparently to inadvertence, are somewhat in error substantively regarding Staff's and ComEd's respective positions (as shown, for example, by Appendix A to the Order) and therefore should be corrected as suggested in ComEd's Exceptions.

3. Operating Expenses

a. Functionalization of Generation, Transmission, and Distribution Expenses

First, page 53 of the Order identifies four of ComEd's six main witnesses on the subject of the functionalization of its operating expenses. The Order would be more complete and accurate if it identified all six main ComEd witnesses, including Messrs. Born and DeCampli, as suggested in ComEd's Exceptions. (*See* DeCampli Dir., ComEd Ex. 6.0, pp. 19:408-23:480; Born Dir., ComEd Ex. 17.0, pp. 1:7-9, 4:77-7:147). ComEd also requests a small addition for clarity be made to the fourth full paragraph of page 55, as suggested in ComEd's Exceptions.

Second, page 55 of the Order states in part: "ComEd explains that the Coalition's arguments are without merit for several reasons. First, the evidence shows the costs at issue are jurisdictional distribution costs that are correctly functionalized. ComEd notes that the Coalition's comments about its CBMS system were addressed in Section II.C.2, above." Those statements omit a reference to GCI's parallel arguments; ComEd's responses to the ARES Coalition also refute GCI's arguments. Also, those statements' completeness would be enhanced by a small amount of additional information regarding CBMS. (*See* Section II.C.2, *supra*).

Third, page 55 of the Order, in summarizing ComEd's response to the ARES Coalition's arguments, does not refer to ComEd's responses to the arguments relating to "locking in decisions" that affect future rate cases, CTCs, and refunctionalization, although such responses largely are reflected elsewhere in the Order. Inclusion of the additional information and cross-references proposed in ComEd's Exceptions would enhance the summary's completeness.

The Order elsewhere summarizes ComEd's arguments on the limited extent to which rulings in this Docket may affect future rate cases. (Order at 20-21). The Order there correctly rejects the ARES Coalition's arguments on that subject. (*Id.* at 21). The ARES Coalition's

argument regarding CTCs here, which assumes complete CTC offsets, is contradicted by the ARES Coalition's arguments regarding CTCs elsewhere, which question the extent to which there will be CTC offsets, as is noted by the Order elsewhere. (*Id*. at 12). As the Order elsewhere recognizes, even with ComEd's initial proposed jurisdictional revenue requirement (which is $104 million higher than ComEd's revised proposed revenue requirement and does not reflect the downward adjustments accepted by ComEd) and even with the current "Period A" prices under approved Rider PPO - Power Purchase Option, the evidence shows that while customer classes and groups comprising well over 90% of its non-residential customers will have positive CTCs, the five residential customer classes would not have positive CTCs.[†] (Alongi-Kelly Dir., ComEd Ex. 13.0 CR, pp. 6:126-30, 7:143-46, 40:886-41:904 and Att. G; Order at 12).

Overwhelming evidence shows that ComEd correctly functionalized its jurisdictional operating expenses, including its refunctionalized expenses. There is no contrary evidence regarding the refunctionalized expenses, just the ARES Coalition's unsupported innuendo. Of course, as the Order indicates, none of the costs to which the ARES Coalition refers, including the refunctionalized expenses, ever were recorded as a supply cost, nor were held to be such in Docket 99-0117. (ComEd Reply Br. at 41-42; Order at 55, 56).

The second sentence of the fourth full paragraph on page 53 should, therefore, be amended as follows: "It argues that the testimonies of its witnesses Hill, Voltz, Heintz, Sterling,

[†] Moreover, market prices for electricity have fallen significantly since the current Period A prices under Rider PPO were set. (Juracek Reb., ComEd Ex. 20.0, pp. 16:412-17:424, 18:458-19:462, 19:473-21:506, 22:535-24:586 and ComEd Exs. 20.1 (class CTCs), 20.2 (group CTCs)). Thus, even with the transmission revenue requirement proposed to FERC in 2001, and later dismissed, current forward prices yield similar if not even more favorable results (but not a 100% offset) in terms of positive CTCs, including a positive CTC for the largest residential customer class (but not for all residential customers). (Juracek Sur., ComEd Ex. 41.0, pp. 4:79-81, 13:319-22, 23:538-24:559 and ComEd Exs. 41.2, 41.3, 41.4, 41.5).

Born, and DeCampli overwhelmingly support its position." ComEd also requests that the third full paragraph of page 55 be amended as follows:

> ComEd explains that the Coalition's and GCI's arguments are without merit for several reasons. First, the evidence shows the costs at issue are jurisdictional distribution costs that are correctly functionalized. ComEd notes that the Coalition's and GCI's unsupported and false comments about its CBMS system, which simply is ComEd's electronic general ledger, which ComEd has used for over four years, which has been audited in three annual audits by ComEd's independent auditors, and which Staff had every opportunity to employ, were addressed in Section II.C.2, above.

Finally, ComEd requests that the following additional paragraph be added after the fifth full paragraph on page 55:

> Finally, ComEd points out that the ARES Coalition's remaining arguments are without merit. ComEd's responses to the ARES Coalition as to future rate cases are referenced in Section I.C.4 of this Order. The ARES Coalition's argument regarding CTCs here is contradicted by its argument regarding CTCs referenced in Section II.C.2 of this Order. ComEd also points to its evidence regarding CTCs referenced in Section II.C.2 of this Order.

c. Proposed Known and Measurable Changes to Test Year Expenses

(ii) "Levelization" Adjustments

(a) Tree Management Expense

Page 65 of the Order rejects ComEd's proposed $513,000 downward adjustment to the $46,871,000 in jurisdictional tree management expenses it incurred in the 2000 test year, which downward adjustment is based on a three-year levelization period (ComEd's proposed downward adjustment is overstated because it is not corrected for inflation), in favor of GCI's proposed additional $4,703,000 downward adjustment, which is based on a six-year levelization period (also not corrected for inflation). Page 65 of the Order also states that Staff's proposed additional $7,028,000 proposed downward adjustment, which is based on an eight-year

levelization period (corrected for inflation), would be reasonable, although the Order declines to adopt that approach. The Order errs, in each respect.

GCI's and Staff's proposals each are premised on the fact that from October 1998 to May 2000, ComEd accelerated tree trimming in order to achieve a four-year cycle. (*E.g.*, Staff Init. Br. at 45-46; GCI Init. Br. at 49). That fact does not justify their proposals, for several reasons.

- The evidence demonstrates that a three-year levelization period for tree management expenses is appropriate given the specific activity and funding levels in those three years and going forward. (Voltz Dir., ComEd Ex. 5.0, pp. 21:443-23:485; Hill Dir., ComEd Ex. 4.0 CR, App. C, Sch. C-2.11; Voltz Reb., ComEd Ex. 24.0 CR, pp. 15:315-17, 16:323-35; Voltz Sur., ComEd Ex. 46.0, pp. 16:350-18:399; Voltz, Tr. 1992:8-21). Neither GCI nor Staff has shown any error in ComEd's analysis.

- ComEd's tree management activities and funding levels pre-1998 were insufficient for the four-year cycle and the resulting higher level of reliability that ComEd now is achieving, so levelizing using pre-1998 data is erroneous and unfair. Moreover, GCI and Staff have chosen periods that plainly are biased to produce too large a total downward adjustment. (Voltz Reb., ComEd Ex. 24.0 CR, pp. 14:282-15:300; Voltz Sur., ComEd Ex. 46.0, pp. 16:350-19:399). Cross-examination of Staff's and GCI's respective witnesses confirmed the invalidity and mathematical biases of their proposals. (Jones, Tr. 1704:8-1712:4; Effron, Tr. 2021:7-2022:5, 2038:5-2043:16; Schlissel, Tr. 2185:16-2187:14, 2187:20-2188:3). Also, GCI, unlike Staff, inappropriately did not correct for inflation. (Effron Dir., GC Ex. 2.0, GC Ex. 2.1, Sch. DJE-2.1). GCI should have used Staff's 3.5% annual inflation factor through 2000. (*E.g.*, Voltz Reb., ComEd Ex. 24.0 CR, p. 17:343-47; Voltz Sur., ComEd Ex. 46.0, p. 10:208-09). That would reduce GCI's proposed additional downward adjustment from $4,703,000 to $4,003,000.

- The evidence does not support the assumption that the accelerated tree trimming in fact incrementally increased ComEd's costs. Depending on the circumstances, accelerated tree trimming may decrease, not increase costs; yet, neither Staff's nor GCI's witnesses made any independent determination that any such increase in fact occurred. (Voltz Reb., ComEd Ex. 24.0 CR, p. 16:318-25; Voltz Sur., ComEd Ex. 46.0, pp. 16:367-17:384; Jones, Tr. 1704:8-1712:4).

- The estimates made in 1999 regarding ComEd's tree management expenses in 2001 are outdated, and ComEd's tree management budget for 2001, in which no accelerated tree trimming occurred, in fact was approximately $42,950,000. (Voltz Sur., ComEd Ex. 46.0, p. 18:385-91). Staff's and the Order's reliance on the estimate made in 1999 in the face of the 2001 budget therefore is erroneous. GCI's proposed additional downward adjustment results in a figure that is

$1,295,000 lower than the 2001 budget, while Staff's proposed additional downward adjustment results in a figure that is $3,620,000 lower than the 2001 budget. There is no valid reason for an adjustment that drives the figure below the 2001 budget. Moreover, under no circumstances can GCI's and Staff's proposed additional downward adjustments, especially the latter, be deemed reasonable in light of the 2001 budget.

- Finally, even assuming, incorrectly, that the evidence showed that ComEd's 20 months of accelerated tree trimming incrementally increased ComEd's tree management expenses, that simply does not warrant GCI's and Staff's respective 72- or 96-month levelization periods, especially when it is undisputed that ComEd's pre-1998 activities and costs are not representative of ComEd's activities and costs going forward. Even if ComEd's three-year levelization period were to be rejected, then the next most reasonable levelization period would be 48 months, 1997-2000, which would result in a further $545,000 downward adjustment (corrected for inflation) on top of ComEd's initial proposed $513,000 downward adjustment, resulting in a total downward adjustment of $1,058,000. (Voltz Reb., ComEd Ex. 24.0 CR, pp. 16:336-17:347; Voltz Sur., ComEd Ex. 46.0, p. 18:392-99).

ComEd accordingly requests that the Order on pages 63 and 64 be supplemented regarding ComEd's position and its responses to other parties' arguments. ComEd's proposed supplementation is shown in ComEd's Exceptions. ComEd also requests that the first full paragraph on page 65 be deleted, as indicated in ComEd's Exceptions, and replacement language inserted as follows:

> The Commission approves ComEd's voluntary downward adjustment of $513,000. Based on the evidence, no further downward adjustment is warranted. ComEd's approach is based on an appropriate analysis of its activities and costs in that period and in the pre-1998 period.

In the alternative, ComEd requests that the first full paragraph on page 65 be deleted as set forth above but that alternative replacement language be inserted as follows:

> The Commission declines to approve ComEd's voluntary downward adjustment of $513,000. Based on the evidence, ComEd's alternative proposed downward adjustment based on a four-year levelization period is the most reasonable approach. That approach results in a further $545,000 downward adjustment on top of ComEd's initial proposed $513,000 downward adjustment, resulting in a total downward adjustment of $1,058,000. Given the facts regarding ComEd's pre-1998 activities and funding levels, and that ComEd

engaged in accelerated tree trimming for 20 months, a levelization period of more than 48 months is not warranted.

Further in the alternative, ComEd requests that the first full paragraph on page 65 be deleted as set forth above but that second alternative replacement language be inserted as follows:

> The Commission declines to approve ComEd's voluntary downward adjustment of $513,000. Based on the evidence, GCI's proposed additional downward adjustment is the most reasonable approach, except that it is not corrected for inflation, which correction would reduce it to $4,003,000, and it results in a figure that even when so corrected still inappropriately is below ComEd's 2001 budget, when ComEd was not engaging in accelerated tree trimming in 2001. The Commission therefore directs that GCI's proposed additional downward adjustment be approved in the reduced amount of $3,408,000, in addition to the $513,000 proposed by ComEd. In making this determination, which is based on the particular evidence presented as to this particular issue, the Commission is making no determination regarding the relevance of ComEd's budgets to any other issue in this proceeding.

(b) Storm Restoration Costs

Page 68 of the Order rejects ComEd's proposed $2,950,000 downward adjustment to the $18,668,012 variable storm damage restoration expenses ComEd incurred in the 2000 test year, which downward adjustment is based on a three-year levelization period (the ComEd's proposed downward adjustment is overstated because it is not corrected for inflation). Page 68 of the Order instead approves GCI's proposed additional $5,771,000 downward adjustment, which is based on a five-year levelization period (also not corrected for inflation). The Order errs.

GCI, seconded by the ARES Coalition (which presented no evidence on the subject), proposes its additional $5,771,000 downward adjustment, using a five-year average, premised on the results-driven reason that the 1998-2000 variable storm damage expense average was

significantly higher than the average in prior years, and because a five-year period was used in Docket No. 99-0117. (GCI Init. Br. at 49-50; ARES Init. Br. at 72). †

The record demonstrates that ComEd appropriately proposed a $2,950,000 downward adjustment to its variable storm damage restoration expenses using a three-year levelization methodology because of many significant changes in its policies and practices relating to emergency storm restoration over the 1998-2000 period, changes that have had a huge effect on reducing storm outage durations. (Voltz Dir., ComEd Ex. 5.0, pp. 19:402-21:442; Voltz Reb., ComEd Ex. 24.0 CR, pp. 17:349-20:415; Voltz Sur., ComEd Ex. 46.0, pp. 19:401-22:469). ComEd, among other things, adopted and implemented a new policy and practice of doing temporary repairs as well as conducting permanent repairs, to enable ComEd to respond more quickly and thus to "get the lights back on" more quickly, while also adopting and implementing new and improved policies and practices regarding goal-setting, training, developing and conducting drills, formalization of storm response roles, formalization of storm tracking and reporting, steps to increase the quantity, quality, and timeliness of outage data, analysis procedures, employee mobilization, expedited call-outs, ticket management, resource allocation, internal communications, customer communications, public communications, and governmental communications, during this three-year period. (*E.g.*, Voltz Reb., ComEd Ex. 24.0, CR, pp. 17:356-19:381). ComEd, since 1998, has experienced approximately 40% reductions in its Customer Average Interruption Duration Index as well as its Customer Average Interruption Frequency Index. (Juracek, Tr. 3684:18-3685:5).

† Staff remarkably proposes a still additional $10,505,000 downward adjustment, using a nine-year average, for the same results-driven reason. (Staff Init. Br. at 46-49). The Order correctly rejects this proposed adjustment.

GCI's and Staff's proposals, and the Order's ruling, incorrectly disregard all of the foregoing changes. Those proposals, and that ruling, effectively place no weight whatsoever on any of those changes, and instead treat 1998-2000 as if it were no different from years before 1998 in terms of ComEd's relevant activities and their costs. This is plainly contrary to the evidence.

In addition, beginning in 1998, ComEd implemented a new accounting system that also makes comparison of pre-1998 variable storm restoration cost data with later cost data difficult and inappropriate, because costs that previously were recorded in other areas now are recorded in storm related projects. (Voltz Dir., ComEd Ex. 5.0, p. 21:435-38; Voltz Reb., ComEd Ex. 24.0 CR, p. 19:386-88). GCI's and Staff's proposals, and the Order's ruling, inappropriately reject the significance of that fact and are thus inappropriate based on an "apples and oranges" analysis.

In sum, GCI's, the ARES Coalition's, and Staff's arguments, and the Order's ruling, fundamentally have it backwards. ComEd's average costs in the 1998-2000 period are higher than its five- or nine-year average, but the main reasons for that variance are ComEd's changes in its policies and practices and its accounting system. (*E.g.*, Voltz Reb., ComEd Ex. 24.0 CR, p. 19:382-92). In contrast, GCI, the ARES Coalition, Staff, and the Order all ascribe 100% of that variance to storm variability. That is not reasonable, nor is it consistent with ComEd's evidence, which, as to the material differences between the 1998-2000 period and prior years in terms of both activities and accounting, is uncontradicted.

Although Staff admits that there are such differences between those periods, Staff does not recognize the nature and implications of those facts. (Sant Dir., Staff Ex. 3.0, pp. 15:295-16:314; Sant Reb., Staff Ex. 17.0 CR, pp. 4:74-9:168). Staff grudgingly concedes that if ComEd is doing temporary repairs when it previously did not, then it "probably" cannot

do that for free (Sant, Tr. 1739:20-22), but Staff refuses to concede, as it reasonably should, that the higher expense levels of 1998-2000 have anything to do with ComEd's dramatic changes in its operations or the changes in accounting or that the pre-1998 data is not comparable. GCI's testimony adds nothing to that of Staff, because it is based on nothing more than the facts that the 1998-2000 average expenses were higher and that a five-year average was used in Docket No. 99-0117. (Effron Dir., GC Ex. 2.0, pp. 12:20-14:6).

GCI, the ARES Coalition, Staff, and, in effect, the Order, insist that ComEd provide numerical quantification of the impact of the changes in 1998-2000 on expenses -- other than the fact of the increased expenses themselves -- even though the relation of the changes to the expenses is clear and such quantification is not possible. (Voltz, Tr. 1993:1-1997:9). That, too, is not reasonable. Indeed, once ComEd made out a *prima facia* case as to the costs needed for its variable storm damage restoration activities, as it did, the burden of going forward with the evidence shifted to other parties; it was not ComEd's burden to disprove in advance all possible arguments against the reasonableness of its costs. *City of Chicago v. People of Cook County*, 133 Ill. App. 3d 435, 442-43, 478 N.E.2d 1369, 1375 (1st Dist. 1985).

Also, GCI, unlike Staff, inappropriately did not correct for inflation. (Effron Dir., GC Ex. 2.0, GC Ex. 2.1, Sch. DJE-2.2). Had GCI properly used Staff's 3.5% annual inflation factor through 2000, its proposed additional downward adjustment would be reduced from $5,771,000 to $4,566,000. (*E.g.*, Voltz Reb., ComEd Ex. 24.0 CR, p. 17:343-47; Voltz Sur., ComEd Ex. 46.0, p. 10:208-09).

Even assuming, incorrectly, that a longer levelization period would be appropriate, which it would not, then the next most reasonable choice would be 1998 to August 2001 -- not the periods proposed by GCI and Staff -- and use of that period would result only in an additional

downward adjustment of $748,000 (corrected for inflation). (Voltz Reb., ComEd Ex. 24.0 CR, pp. 19:393-20:408; Voltz Sur., ComEd Ex. 46.0, pp. 19:401-10, 21:448-61). Indeed, if that alternative were modified, as the possibility is raised by Staff, to levelize both fixed and variable storm damage restoration costs, then that alternative actually would reduce, not increase, ComEd's proposed downward adjustment by $600,000 (corrected for inflation), but ComEd believes that consistency would be better served by its alternative without that modification. (Voltz Sur., ComEd Ex. 46.0, p. 21:448-61).

ComEd accordingly requests that the first full paragraph on page 68 be deleted, as indicated in ComEd's Exceptions, and replacement language inserted as follows:

> The Commission recognizes that costs change over time, and the Commission generally discourages the use of outdated figures for the purpose of calculating rates. The normalization period suggested by Staff unjustifiably goes back more than eight years and does not appropriately reflect ComEd's most recent activities and expenditures. GCI's five-year period also is inappropriate for the same reasons, although its five-year period is not as unreasonable. ComEd is to be commended, not punished, for the steps it has taken to reduce storm outage durations, and is entitled to recover the costs of improved service. Further, the Commission finds that for the purposes of this proceeding, a three-year average, using current and relevant figures, is sufficient to determine normality for costs for ComEd's current policies and practices. Further, pre-1997 data quite apparently is not entirely comparable to post-1997 data in view of the changes in policies and practices as well as accounting. The Commission approves ComEd's calculation.

In the alternative, ComEd requests that the first full paragraph on page 68 be deleted as set forth above and alternative replacement language be inserted as follows:

> The Commission recognizes that costs change over time, and the Commission generally discourages the use of outdated figures for the purpose of calculating rates. The normalization period suggested by Staff unjustifiably goes back more than eight years and does not appropriately reflect ComEd's most recent activities and expenditures. GCI's five-year period also is inappropriate for the same reasons, although a five-year period is not as unreasonable. ComEd is to be commended, not punished, for the steps it has taken to reduce storm outage durations, and is entitled to recover the costs of improved service. Further, the Commission finds that for the purposes of this proceeding, a three-year and eight-month average, using current and relevant figures, is sufficient to determine

normality for costs for ComEd's current policies and practices. Further, pre-1997 data quite apparently is not entirely comparable to post-1997 data in view of the changes in policies and practices as well as accounting. The Commission approves ComEd's alternative calculation.

Further in the alternative, ComEd requests that the first full paragraph on page 68 be deleted as set forth above but that second alternative replacement language be inserted as follows:

The Commission declines to approve ComEd's voluntary downward adjustment of $2,950,000. The Commission recognizes that costs change over time, and the Commission generally discourages the use of outdated figures for the purpose of calculating rates. The normalization period suggested by Staff unjustifiably goes back more than eight years and does not appropriately reflect ComEd's most recent activities and expenditures. Based on the evidence, GCI's proposed additional downward adjustment is the most reasonable approach, except that it is not corrected for inflation, which correction would reduce it to $4,566,000. The Commission therefore directs that GCI's proposed additional downward adjustment be approved in the reduced amount of $4,566,000, in addition to the $2,950,000 proposed by ComEd.

(c) Reserve for Levelized Variable Storm Damage Expenses

On page 70 the Order declines to approve ComEd's variable storm damage expense reserve proposal. The Order errs in rejecting ComEd's proposal. The Order's statement that "this proposal is unnecessary and may result in an unreasonable level of reserves coupled with the potential for uneven benefits" is not consistent with the evidence in the record. Also, the proposal, as a matter of law, does not violate the single issue ratemaking doctrine, nor is it inconsistent with test year principles. The concern expressed by Staff regarding retroactive ratemaking is more serious, but ComEd respectfully submits that it should not be found to be applicable here based on the evidence in the record. Alternatively, the Order should be supplemented to state that its determination should not be considered to foreclose ComEd from presenting a revised proposal in the future that seeks to address Staff's ratemaking concerns.

The record plainly shows that the storm reserve proposal is in all parties' interests, and that the concerns raised by Staff, the only party to present any opposition to the proposal, are unwarranted and in part are based on a misunderstanding of the facts. (Voltz Dir., ComEd Ex. 5.0, pp. 23:487-25:524; Voltz Reb., ComEd Ex. 24.0 CR, pp. 20:417-24:512; Voltz Sur., ComEd Ex. 46.0, pp. 22:471-26:571). The cross-examination of Staff's witness confirmed that shareholders and customers alike may benefit from the proposal, although not necessarily in perfectly equal measure, and that no one will be worse off as a result of the proposal. (Sant, Tr. 1741:13-1744:18).

Staff's argument, that stockholders obtain a unique benefit of recovering certain costs "risk free" (Staff Init. Br. at 54), overlooks that any benefits to stockholders are part and parcel of the stabilization of earnings that benefits all parties (*id.*) and ignores that under the proposal stockholders bear the unequal burden of funding the full reserve each year even if actual expenses are less (*e.g.*, Voltz Reb., ComEd Ex. 24.0 CR, pp. 23:485-24:493). Staff's argument also does not change Staff's inability to identify anyone the proposal would harm, and does not alter the fact that allegedly uneven benefits simply are not a sufficient reason to reject the proposal. (*E.g.*, Voltz Reb., ComEd Ex. 24.0 CR, pp. 20:420-21:427, 23:481-24:508; Sant, Tr. 1741:13-1745:15). Absent unlawfulness (or some other valid and sufficient non-economic objection), a "Pareto optimal" proposal -- one that benefits some or all and harms no one -- should be adopted, from the standpoint of economic efficiency. (*See* Chalfant, Tr. 2553:1-13). The Commission should not adopt a new policy of rejecting Pareto optimal proposals simply because not everyone necessarily will benefit perfectly equally. Such a policy, which has no apparent legal basis, would conflict with the Commission's basic obligation to approve proposals that, based on the law and the evidence, are just and reasonable. 220 ILCS 5/9-201(c),

16-108(a), (d). Such a policy also cannot be reconciled with the fact that day in and day out the Commission approves proposals that do not benefit everyone equally but that are lawful and just and reasonable.

Staff's single issue ratemaking doctrine and test year principles argument (Staff Init. Br at 49-53) does not apply to the type of reconciliation mechanism proposed here. *See Citizens Utility Bd. v. Illinois Commerce Comm'n.*, 166 Ill. 2d 111, 137, 651 N.E.2d 1089, 1102 (1995). (Voltz Dir., ComEd Ex. 5.0, pp. 23:490-24:508; Voltz Reb., ComEd Ex. 24.0 CR, pp. 21:428-22:466; Voltz Sur., ComEd Ex. 46.0, pp. 22:471-87, 24:519-26:561). Indeed, that doctrine does not apply to this Docket at all, because it applies only to complete base rate cases, and delivery service rates are not base rates. *Citizens Utility Bd.*, 166 Ill. 2d at 137, 651 N.E.2d at 1102; 220 ILCS 5/16-102.

Staff's retroactive ratemaking argument (Staff Init. Br. at 53) is a more serious concern. ComEd respectfully submits, however, that the two cases Staff cites are not directly on point to ComEd's storm reserve proposal, which sets up in advance a form of reconciliation measure for a uniquely variable cost, in which rates are only ever set prospectively in a ratemaking proceeding, and where Statement of Financial Accounting Standards No. 71 permits such a reserve if it has Commission approval.[†] (Voltz Dir., ComEd Ex. 5.0, pp. 24:513-25:524; Voltz Reb., ComEd Ex. 24.0 CR, pp. 23:481-24:508).

Thus, the proposal should be approved. To fail to adopt the proposal, if it is lawful, is in no one's interests. In the alternative, because the proposal is in all parties' interests, the Order

[†] *Citizens Utilities Co. of Illinois v. Illinois Commerce Comm'n*, 124 Ill. 2d 195, 529 N.E.2d 510 (1988), involves a downward adjustment to rate base ordered by the Commission outside a ratemaking proceeding based on past over-recovery of a particular cost. The case of *Business and Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 555 N.E.2d 693 (1989), involved a proposed settlement agreement in a ratemaking proceeding providing for retroactive refunds over each of five years outside of any ratemaking proceeding.

should be supplemented to state that its determination should not be considered to foreclose ComEd from presenting a revised proposal in the future that seeks to address Staff's ratemaking concerns. Accordingly, the third full paragraph on page 70 should be amended as follows:

> Based on our review of the Company's novel storm reserve proposal as well as Staff's arguments we conclude that this proposal ~~is unnecessary and may result in an unreasonable level of reserves coupled with the potential for uneven benefits. We further conclude that this proposal may be on the cusp of being violative of the basic tenets of utility ratemaking. Accordingly, the Commission declines to adopt ComEd's proposal.~~should be approved. The evidence in the record permits no conclusion other than that the storm reserve proposal over time benefits all market participants and harms no one. Staff's single issue ratemaking and test year principles arguments are inapplicable to this particular proposal. While concern regarding retroactive ratemaking is appropriate, the Commission does not believe that ComEd's proposal, which involves setting rates going forward for a uniquely variable cost and only in a ratemaking proceeding, and in light of FAS 71, should be considered as contrary to that principle.

In the alternative, ComEd requests that the third full paragraph on page 70 be amended as follows:

> Based on our review of the Company's novel storm reserve proposal as well as Staff's arguments we conclude that this proposal ~~is unnecessary and may result in an unreasonable level of reserves coupled with the potential for uneven benefits. We further conclude that this proposal may be on the cusp of being violative of the basic tenets of utility ratemaking. Accordingly, the Commission declines to adopt ComEd's proposal.~~should not be approved at this time. However, the Commission's determination should not be considered to foreclose ComEd from presenting a revised proposal in the future that seeks to address Staff's ratemaking concerns.

(d) Other Issues

(iv) Adjustments for Post-Test Year "Merger Savings"

Page 81 of the Order, in the middle of discussion of GCI's arguments regarding adjustments for post-test year "merger savings," mistakenly includes the sub-heading "**ComEd's Response**". That is an apparent typographical error. The two paragraphs appearing under that sub-heading are continuations of GCI's arguments. That sub-heading should be deleted.

Pages 82-83 of the Order summarize ComEd's responses to other parties' positions. The summary's completeness would be enhanced with the brief supplementation proposed in ComEd's Exceptions. (*E.g.*, ComEd Init. Br. at 71-73).

Page 83 of the Order includes statements regarding ComEd's approach to downward adjustments and ComEd's analysis regarding "merger savings" that are inconsistent with the evidence in the record and are erroneous. In addition, the completeness and clarity of the Order's discussion would be enhanced by an express reference to the denial of GCI's proposed "merger savings" adjustment.

The Order's statement regarding ComEd's approach to downward adjustments simply is incorrect and unfair, for several reasons. First, the evidence is uncontradicted that ComEd in various respects requested a smaller revenue requirement than it legally is entitled to request, and made many downward adjustments to its test year data. For example, in its direct case:

- ComEd included in rate base only a portion of the distribution plant placed in service and serving customers in the first quarter of 2001, only a portion of the distribution plant reasonably expected to be (and in fact) placed in service and serving customers in the second quarter of 2001, and none of the distribution plant reasonably expected to be placed in service and serving customers in the third and fourth quarters of 2001 or at any time in 2002, even though ComEd continues and will continue to make such plant additions. (*See* Section I.C.3, *supra*). It is undisputed, and the Order expressly confirms (Order at 40), that ComEd legally was entitled to seek upward *pro forma* adjustments for all rate base additions reasonably expected to be placed in service and serving customers on or before the date of the Commission's order in this proceeding, or within 12 months of the initiation of this proceeding, which was filed on June 1, 2001. (*See* Section I.C.3, *supra*).

- ComEd made three levelizing downward adjustments to test year data, *i.e.*, as to tree management expenses, variable storm damage restoration expenses, and the uncollectibles component of its gross revenue conversion factor. (Sections II.D.3.c.ii.a, II.D.3.c.ii.b, *supra*; *see also, e.g.*, Order at 61-62, *et seq*.)

- ComEd also made various other non-levelizing downward adjustments, *e.g.*, the exclusion of all incremental costs incurred in the test year related to the Liberty and Vantage reports (*e.g.*, Order at 16, *et seq.*), a reduction related to a credit for obsolete materials (ComEd Init. Br. at 73), and the exclusion of all incremental

costs incurred in the test year related to the Unicom - PECO merger (*e.g.*, Order at 83-84).

Second, ComEd, in its rebuttal testimony, its surrebuttal testimony, and its Initial Brief, made and agreed to numerous additional downward adjustments (while not always agreeing that such downward adjustments were warranted), resulting in a revised proposed jurisdictional revenue requirement that is $104 million lower that its initial proposed jurisdictional revenue requirement. (*E.g.*, Order at 17, 25). ComEd:

- Accepted Staff's reduced rate of return, 8.99%, which is considerably lower than ComEd's proposed rate of return, 9.95%. (*E.g.*, Order at 25).
- Accepted Staff's downward adjustments regarding retired plant, replacement plant, interest on customer deposits (ComEd not only accepted the portion of Staff's analysis that resulted in a downward adjustment but also declined the portion of Staff's position that proposed an upward adjustment), incentive compensation (affecting three different plans), and outside collection agencies. (*E.g.*, Order at 41, 42, 95-96, 101-02, 103-04).
- Accepted five of GCI's downward adjustments to ADIT and GCI's downward adjustment to real estate taxes (ComEd's acceptance of the latter adjustment was conditional, but based on rulings in the Order the acceptance has become final unless those rulings are altered). (*E.g.*, Order at 41, 101).
- Made a further downward adjustment to its rate base. (*E.g.*, Order at 38).
- Accepted that the full financial impacts of all downward adjustments must correctly be reflected, *e.g.*, as to ADIT, accumulated depreciation, depreciation expenses, payroll taxes, and other taxes. (*E.g.*, ComEd Init. Br., App. A).

Finally, ComEd, in this Brief on Exceptions, also is accepting Staff's proposed layoff and bill payment center downward adjustments and most of Staff's proposed "research and development" downward adjustment. ComEd is doing so even though it does not agree that those adjustments are warranted. (*E.g.*, ComEd Init. Br. at 71-73; ComEd Reply Br. at 51). Given ComEd's many voluntary downward adjustments, its acceptance of numerous downward adjustments proposed by other parties, and its even declining an upward adjustment proposed by Staff, it simply is not accurate or appropriate for the Order to state, as it does, that: "It seems that

the Company is only a fan of known and measurable adjustments when such an adjustment inures to its benefit." (Order at 83). That language should be deleted.

In addition, the Order in part misapprehends ComEd's arguments, and as a result criticizes ComEd for making an argument that ComEd in fact never made. ComEd has never contended that any alleged post-test year "merger savings" are included in its proposed revenue requirement. ComEd has contended and proved that all its incremental merger costs that were incurred in the test year were excluded from its proposed revenue requirement, while all "merger savings" that were incurred in the test year are reflected in its proposed revenue requirement. (*E.g.*, ComEd Init. Br. at 71; Hill Dir., ComEd Ex. 4.0 CR, Sch. C-2.5; Hill Sur., ComEd Ex. 45.0, p. 39:842-50). ComEd also has contended that, in view of those undisputed facts, as well as for other reasons, it is appropriate not to make any downward adjustments to its proposed revenue requirement for post-test year alleged "merger savings." (*E.g.*, ComEd Init. Br. at 71-73). It simply is not the case, as the Order suggests (Order at 83), that ComEd has contended that its proposed revenue requirement reflects Staff's alleged post-test year "merger savings" relating to layoffs and bill payment center closings. The Order accordingly should be revised.

Finally, as noted earlier, the completeness and clarity of the Order's discussion would be enhanced by an express reference to the denial of GCI's proposed "merger savings" adjustment. GCI's proposed adjustment is not supported by the evidence and does not even remotely meet the standards for a *pro forma* adjustment. (*E.g.*, ComEd Init. Br. at 71-73; ComEd Reply Br. at 51). ComEd accordingly requests that a portion of the first full paragraph on page 83 be amended as suggested in ComEd's Exceptions.

e. Other Proposed Adjustments to Expenses

(i) Exclusion of Incremental Expenses Related to Unicom/PECO Merger

Page 84 of the Order states in part:

> Consistent with discussion above, we conclude that ComEd has, with certain exceptions properly removed merger related costs and finds that the Company should make aggregate downward adjustments of $34,515,000, as well as the Staff and GCI adjustments which the Commission finds reasonable in Section II. c. (iv) of this Order.

The Order's language here is problematic in two respects.

First, there is no basis in the evidence in the record for the qualifying language "with certain exceptions…." While there is a dispute about the inclusion of alleged post-test year "merger savings" in this proceeding (*see* Section II.D.3.d.iv, *supra*), there is no dispute about the exclusion of merger costs. Merger costs and merger savings are two different things. ComEd removed from its test year jurisdictional revenue requirement all incremental merger-related costs (and also has reflected all jurisdictional test year merger savings in its adjusted test year). (Hill Dir., ComEd Ex.4.0 CR, Sch. C-2.5; Hill Sur., ComEd Ex. 45.0, p. 39:842-50; *see also* Section II.D.3.d.iv, *supra*). No party does or can contend otherwise. Thus, the Order's above qualifying language should be deleted.

Second, the Order's reference to "the Staff and GCI adjustments which the Commission finds reasonable in Section II.c.(iv) of this Order" is unclear. ComEd is not certain, but, based on the context, believes that the Order intended to refer to "the Staff ~~and GCI~~ adjustments for post-test year merger savings which the Commission finds reasonable in Section II.D.3.d ~~c.~~ (iv) of this Order."

ComEd, assuming the latter interpretation is correct, accordingly requests that the second full paragraph of page 84 be amended as follows:

Consistent with discussion above, we conclude that ComEd has~~, with certain exceptions~~ properly removed merger related costs and finds that the Company should make aggregate downward adjustments of $34,515,000, as well as the Staff ~~and GCI~~ adjustments for post-test year merger savings which the Commission finds reasonable in Section II.D.3.d ~~c.~~ (iv) of this Order.

(ii) Exclusion of Audit-Related Costs

ComEd, in its direct case, voluntarily removed all of its incremental jurisdictional operating expenses incurred in the test year related to the Liberty and Vantage audits, resulting in an aggregate downward adjustment of $2,098,000. (Hill Dir., ComEd Ex. 4.0 CR, p. 28:595-99 and App. C, Schs. C-2, C-2.13; Voltz Dir., ComEd Ex. 5.0, pp. 16:346-17:353, 18:377-19:401). No party submitted evidence in opposition to that adjustment. Although the ARES Coalition questioned whether ComEd failed to exclude incremental costs for employee interviews, the evidence is uncontradicted that the interviews did not result in any incremental costs. (Juracek, Tr. 3396:15-3405:20). Therefore, the following language should be added immediately before the last "Commission Analysis and Conclusion" section on page 84:

ComEd's Response

ComEd responds that the ARES Coalition's speculation is unsupported. The evidence is uncontradicted that the interviews did not result in any incremental costs.

(iv) Advertising Costs

Pages 87-88 of the Order inadvertently reverse the sequence of "ComEd's Response" and the "ARES Position". The sequence should be corrected as shown in ComEd's Exceptions. In addition, the section that summarizes ComEd's response should be supplemented as indicated in ComEd's Exceptions.

(ix) Research and Development Costs

Page 95 of the Order rejects ComEd's analysis allocating $4,459,000 of its total $8,745,000 in "Other Experimental and General Research Expenses" (also referred to by Staff and in the Order as "research and development" or "R & D" expenses) to its jurisdictional revenue requirement. The Order instead adopts Staff's disallowance of $3,529,000 of that $4,459,000. The Order's rejection in Section II.D.3.e.viii of Staff's and the ARES Coalition's respective proposed adjustments to ComEd "Special Projects" expenses (Order at 94) is internally inconsistent with the Order's recommendation concerning R & D expenses. Those rulings should be reconciled.

The Order's discussion relating to "Special Projects" correctly recognizes that the jurisdictional amount ComEd proposes for "Other Experimental and General Research Expenses" includes the jurisdictional $1,174,000 attributable to "Special Projects" discussed in Section II.D.3.e.viii (Order at 93), and that such special projects include outage protection and distribution reliability improvements (*id.*). The Order's recommendation relating to "Special Projects" states, in part: "The Commission finds that ComEd's proposed costs for Special Projects are reasonable, particularly in light of Staff's careful scrutiny of the R&D-related costs." (*Id*. at 94). The Order also states: "Therefore, after review of the evidence presented, we find that ComEd's adjustment for special projects is appropriate, just and reasonable, and we approve ComEd's costs as proposed." (*Id*.) Thus, the Order approves ComEd's jurisdictional $1,174,000 in costs relating to Special Projects.

However, the Order goes on to adopt Staff's proposed adjustment to R&D expenses, which results in ComEd's recovering only $930,000 of these expenses. (Order at 95). Yet, there is no question that Staff's proposed disallowance of R&D expenses included the jurisdictional amount relating to the above "Special Projects" costs, $1,174,000. (The Order recognizes that

Staff's $1,174,000 downward adjustment for Special Projects was already reflected in Staff's proposed R&D adjustment. (Order at 93)). Therefore, in light of the Order's recommendations approving jurisdictional "Special Projects" expenses of $1,174,000 and Staff's total R&D adjustment of $3,529,000, the amount of $1,174,000 should be deducted from Staff's total R&D adjustment, resulting in an adjustment in the amount of $2,355,000 rather than $3,529,000. In other words, of the $4,459,000 that ComEd included as jurisdictional R&D expenses, the above analysis of the Order results in a recommendation that the Commission conclude that ComEd recover $2,104,000 of those expenses.

While the evidence supports its recovery of the entire jurisdictional R&D expenses of $4,459,000, ComEd, in order to narrow the issues that remain in dispute, takes no further exception herein to the substance of the Order relating to research and development costs. ComEd accordingly requests that the third full paragraph on page 95 be amended as follows:

> Our review of the arguments and evidence regarding this issue leads us to the conclusion that the Company has failed to demonstrate sufficiently that the totality of its R & D expenses, exclusive of the portion uncontested by Staff and of the Special Projects expenses discussed in Section II.D.3.e.viii of this Order, are tied to delivery services. We find that the information provided by the Company indicated that the end result of some of the R & D would be a marketable product that has no delivery services characteristics. While Staff focuses on the potential marketability of an R & D product, we focus on the information provided by the Company to support the conclusion that these costs should be included in the jurisdictional costs. We find the information provided by the Company to be lacking and insufficient in part. On this basis and after reducing the adjustment by $1,174,000 to allow for recovery of the approved Special Projects costs, we adopt Staff's proposed disallowance in the reduced amount of $2,355,000.

(xi) Uncollectibles Expense

Page 97 of the Order fails to note that Staff's proposed four-year average based on the years 1996-2000 omits the year 1999 due to non-recurring activities. (Jones Dir., Staff Ex. 2.0, p. 6:117-23). ComEd has proposed an appropriate addition in its Exceptions.

Pages 97-98 of the Order inadvertently reverse the sequence of "ComEd's Response" and the "ARES Position". The sequence should be corrected as shown in ComEd's Exceptions.

(xii) Taxes Other Than Income Taxes

The Order: (1) accepts in part and rejects in part GCI's state use tax adjustment, and uses a figure of $1,126,000 for that adjustment; (2) accepts Staff's payroll tax adjustment based on three other Staff proposed adjustments, only two of which the Order accepts, and uses a figure of $3,327,000 for the payroll tax adjustment; and (3) accepts GCI's real estate tax accrual true up adjustment, and uses a figure of $2,633,000 for that adjustment. (Order at 101 and App. A, Sch. 2, pp. 1, 2, 5). The Order thereby errs, in four different respects.

- GCI's and Staff's proposed downward adjustments to ComEd's use tax costs are each unjustified. Staff's proposed disallowance is arbitrary and is inconsistent with its position regarding real estate tax refunds, and both GCI's and Staff's proposed adjustments are unwarranted because the taxes at issue are legitimate business expenses imposed by Illinois tax law, those costs would be present in plant in service and thus would be incorporated in the jurisdictional revenue requirement were it not for ComEd's accounting policy, and ComEd routinely is subjected to tax compliance audits resulting in either an increase or decrease in tax liabilities. (Hill Reb., ComEd Ex. 23.0 CR, pp. 22:479-23:505; Hill Sur., ComEd Ex. 45.0, pp. 29:618-30:640). Indeed, Staff acknowledges that the use tax is a legitimate business expense. (Jones Reb., Staff Ex. 16.0, 6:116-19).

- The correct amount for the portion of GCI's proposed use tax adjustment that was accepted by the Order was only $506,000, not $1,126,000. (Effron Reb., GC Ex. 5.0, GC Ex. 5.1, Sch. DJE-4R). The way that $506,000 figure may be derived from GCI's analysis is as follows: (1) ComEd's test year use tax expense was $3,784,000; (2) less the $1,366,000 of interest included in that expense, the portion to which GCI objects, yields $2,418,000; (3) of which $895,000 -- 37.02% -- is jurisdictional; (4) which is $506,000 less than ComEd's proposed figure of $1,401,000. (*Id*.) Thus, even supposing that a use tax adjustment were warranted, which it is not, it should only be $506,000. ComEd has reflected that corrected figure in its corrected version of Appendix A to the Order. (ComEd's corrected version also corrects the cite in Appendix A for the adjustment).

- Appendix A to the Order accepts Staff's payroll tax adjustment based on three other Staff proposed adjustments, only two of which the Order accepts -- the Order accepts the proposed layoff and revised incentive compensation adjustments but correctly does not accept the distribution salary and wages

adjustment (Order at 72, 83) -- and uses a figure of $3,327,000 for the payroll tax adjustment. The correct amount for the payroll tax impact of the two approved adjustments is only $2,613,000, *i.e.*, 8% times $32,657,000, the sum of the two approved adjustments. ComEd, while disagreeing with them, has accepted those two adjustments. The Order, as noted above, correctly does not accept the third adjustment. Thus, the amount of the payroll taxes adjustment should be $2,613,000. ComEd has reflected that corrected figure in its corrected version of Appendix A to the Order.

- The Order inadvertently uses GCI's initial figure of $2,633,000 for its real estate tax accrual true up adjustment rather than GCI's corrected figure of $1,854,000. (Effron Reb., GC Ex. 5.0, GC Ex. 5.1, Sch. DJE-4R). ComEd's acceptance of GCI's real estate tax adjustment was conditional, but based on rulings in the Order the acceptance has become final unless those rulings are altered. Thus, the amount of the adjustment should be $1,854,000. ComEd has reflected that corrected figure in its corrected version of Appendix A to the Order.

ComEd accordingly requests that the carryover paragraph on pages 100-01 be amended by the addition of the following sentence at the end of that paragraph: "Mr. Effron later corrected the figure for his proposed reduction to be $1,854,000." ComEd also accordingly requests that the fourth and fifth full paragraphs on page 101 be amended as follows:

> ~~We find convincing GCI's argument relative to the Illinois use tax and adopt its suggestion that the interest component be excluded as ratepayers should not bear the burden for a late tax payment. The Commission, however, declines to adopt GCI's proposal relative to the 39-month recovery period for this item.~~We reject Staff's and GCI's proposed use tax adjustments as not warranted based on the evidence.
>
> We accept Staff's payroll tax adjustment to the extent that it reflects Staff's approved layoff and revised incentive compensation adjustments discussed in Section II.D.3.d.iv of this Order, and not to the extent that it reflects Staff's proposed distribution salaries and wages adjustment, which we have not approved. Thus, the approved amount of the payroll tax adjustment is $2,613,000. With respect to GCI's proposal to payroll taxes, consistent with our conclusion relative to O & M expenses that impacted payroll taxes we decline to adopt this proposal. We accept GCI's real estate tax accrual true up adjustment in its corrected amount of $1,854,000.

ComEd further requests that Appendix A to the Order be revised as reflected in relevant part in ComEd's corrected version of Appendix A to the Order, which is attached to this Brief on Exceptions.

In the alternative, should GCI's argument be accepted, ComEd requests that the fourth full paragraph on page 101 be amended as follows:

> We find convincing GCI's argument relative to the Illinois use tax and adopt its suggestion that the interest component be excluded as ratepayers should not bear the burden for a late tax payment. The Commission, however, declines to adopt GCI's proposal relative to the 39-month recovery period for this item. Thus, the amount of that adjustment as approved is $506,000.

(xiii) Incentive Compensation

Pages 101-03 of the Order discuss incentive compensation. The Order inadvertently fails to identify this as Section II.D.3.e.xiii, which makes it appear to be a continuation of Section II.D.3.e.xii. The heading should be corrected as shown in ComEd's Exceptions.

Page 102 summarizes ComEd's responses to other parties. ComEd believes that that discussion's completeness would be enhanced if supplemented as shown in ComEd's Exceptions. (*E.g.*, ComEd Init. Br. at 88-89; ComEd Reply Br. at 59-60).

F. Cost of Service and Rate Design

1. Cost of Service Study Issues

a. Marginal Cost Study

The Order concludes that ComEd's delivery services rate design should be based on an embedded cost methodology because that is the approach the Commission took in Docket 99-0117 and in establishing delivery services rates for other Illinois utilities. The Order also finds that an embedded cost approach advances concerns of economic efficiency and sends economically correct price signals. Positing a state-wide policy of using embedded cost delivery services ratemaking, the Order concludes that ComEd presented no argument or evidence to support a marginal cost-based approach.

ComEd respectfully urges reconsideration of those conclusions. The Commission's approval of an embedded cost based rate design in Docket 99-0117, or in delivery services rate proceedings for other utilities, provides no basis for doing so here. The Commission must render its decisions on all disputed issues in this proceeding in accordance with the law and based exclusively on the evidence in the record in this proceeding. 220 ILCS 5/10-103, *BPI 1989*, 136 Ill. 2d at 201, 227, 555 N.E.2d at 697, 709. Prior Commission orders are neither legal precedents nor *res judicata* (*e.g.*, *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill. 2d 1, 22-23, 643 N.E.2d 719, 729 (1994); *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 513, 116 N.E.2d 394, 396-97 (1953)), and cannot justify a decision that is in conflict with the evidence in the record in this case.

The record in this proceeding overwhelmingly supports the use of the marginal cost based rate design proposed by ComEd, and both this evidence and the applicable legal standards warrant a change in the position taken in the 1999 delivery services proceedings. Section 16-108(c) of the Act, 220 ILCS 5/16-108(c), mandates that delivery services charges be "cost based, and shall allow the electric utility to recover the costs of providing delivery services through its charges to its delivery service customers that use the facilities and services associated with such costs." The evidence in support of marginal cost based ratemaking submitted by seven witnesses in this proceeding appearing for ComEd, the U.S. Department of Energy ("DOE"), and Midwest Generation, LLC, ("Midwest") demonstrates that the legal mandate of cost based rates, the associated principle of assigning costs in accordance with cost causation, and the concerns of economic efficiency and sending economically correct price signals that are pivotal to the proper development of the market, are all best served by the marginal cost based approach. (ComEd Init. Br. at 104 (cataloging the evidence)).

The embedded cost approach adopted in Docket 99-0117 was based in part on the Commission's understanding that the DOE and its expert witness Dr. Swan favored that option. In this proceeding, the DOE and Dr. Swan have made it very clear that they have never advocated embedded cost based ratemaking. (Swan Dir., DOE Ex. 1.0 CR, pp. 5-6.) Their objections in Docket 99-0117 were limited criticisms of specific techniques used to estimate marginal costs. Dr. Swan, like every one of the Ph.D. economists who testified on the issue in this proceeding, strongly supports the use of marginal cost rate design.

Dr. George R. Schink, testifying for Midwest, summarized the reasons for using marginal cost-based rates, invoking principles that world-renowned economist Professor William Baumol has testified govern the establishment of economically efficient delivery services rates:

> Professor Baumol observes that a fully competitive unregulated market would produce the best outcome (*e.g.*, the lowest prices for consumers and the highest level of output). He then observes that regulation will produce an outcome as close as possible to the best outcome if the regulatory rules constrain the regulated firm to behave as closely as possible to the way it would behave if the market were fully competitive. In a fully competitive market, market forces cause the relative prices for the various services produced by the firm to reflect the marginal (incremental) costs of producing these services (and not to reflect their relative embedded (average) costs). The marginal (incremental) cost of producing a given service is the cost that is caused by the consumer of that service. Therefore, assuming that the regulatory objective is to produce an outcome that is as close as possible to the outcome that would be produced in a fully competitive market, the relative prices of the various services should be set based on the relative marginal costs of producing these services.

(Schink Reb., Midwest Ex. 5.0, pp. 11:234-12:247). These fundamental economic principles, which caused the Commission to employ marginal cost based ratemaking for over two decades, provide a compelling reason for doing so here.

The evidence also demonstrates that fairness and equitable treatment of customers require the use of marginal cost based rates. Marginal cost based rates assign costs in accordance with cost causation. (Gordon Dir., ComEd Ex. 2.0, p. 11:292-95.) Failure to design rates using

marginal cost principles will introduce the very type of cross subsidization that the Commission should be attempting to avoid in the new competitive marketplace.

In contrast, there is no valid economic rationale for embedded costs ratemaking. Even its advocates concede that it is not supported by any current economic literature whatsoever. (*E.g.*, Lazare, Tr. 2790:15-2791:12; Chalfant, Tr. 2540:5-17). Staff witness Lazare candidly acknowledged that "people who are considered among the noted experts in the field generally favor marginal costs." (Lazare, Tr. 2791:10-12).

The evidence also demonstrates that ComEd's tariffs appropriately implement marginal cost principles. Dr. Kenneth Gordon, former Chairman of the Massachusetts Department of Public Utilities, explained that marginal cost pricing is "essential to economic efficiency and the proper development of competitive markets" (Gordon Dir., ComEd Ex. 2.0, p. 2:77-78), and that:

> ComEd's tariffs are designed to reflect well-established principles of marginal cost-based pricing. Because these tariffs are based on marginal costs, they will send appropriate price signals, which will tend to lead to efficient choices by all parties, while also allowing ComEd a reasonable opportunity to recover its costs of doing business. Most importantly, by relying on marginal-cost-based pricing concepts, ComEd's tariffs are consistent with the basic principles of economic analysis.

(Gordon Dir., ComEd Ex. 2.0, p. 11:281-86.)

In summary, in order to establish cost based rates, to set rates that comport with cost causation, and to "get the price right," the Commission should approve ComEd's marginal cost based rate design. Accordingly, ComEd recommends that the entire paragraph on page 117 of the Order under the heading "Commission Analysis and Conclusions" be deleted and that the following paragraphs be substituted:

> The Commission finds that a marginal cost methodology should be used in this proceeding. The Commission is aware that an embedded cost methodology was used in Docket No. 99-0117. However, the evidentiary record in this proceeding does not permit the conclusion that embedded cost ratemaking complies with Section 16-108(c), even though the Commission so determined

based upon the different evidentiary record in Docket No. 99-0117. Commission orders based on factual conclusions drawn from a different record are neither legal precedents nor *res judicata. E.g.*, *United Cities Gas Co. v. Illinois Commerce Comm'n*, 163 Ill. 2d 1, 22-23, 643 N.E.2d 719, 729 (1994); *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 513, 116 N.E.2d 394, 396-97 (1953). Rather, the Commission must decide this proceeding in accordance with the law and based exclusively on the evidence in the record in this proceeding. 220 ILCS 5/10-103, *BPI 1989*, 136 Ill. 2d at 201, 227, 555 N.E.2d at 697, 709. The Commission also notes that for nearly two decades, the Commission consistently employed marginal cost ratemaking regarding ComEd's bundled service rates, including in dockets where embedded and "across the board" proposals or studies were presented.

The Commission finds that adoption of ComEd's marginal cost approach is consistent with the Act. Section 16-108(c) of the Act, 220 ILCS 5/16-108(c), states that that delivery services charges must be "cost based, and shall allow the electric utility to recover the costs of providing delivery services through its charges to its delivery service customers that use the facilities and services associated with such costs." In order to implement the requirements of this Section, the Commission concludes that rates should be based on the marginal cost study presented by ComEd.

The Commission also finds that the marginal cost approach advances the principles of assigning costs in accordance with cost causation, and the concerns of economic efficiency and sending economically correct price signals that are pivotal to the proper development of the market. The Commission is also persuaded by the DOE's testimony concerning the general acceptance of marginal cost ratemaking as opposed to the embedded cost approach.

Finally, the Commission also finds that ComEd's EPMC is reasonable and correct. The criticisms that have been leveled at ComEd's marginal cost of delivery services study and its resulting rate design are without merit, and in many instances they proceed from a lack of understanding of the data and the conclusions, or an erroneous understanding of the facts on which the study is based. Moreover, the Commission notes that many of the criticisms of the study are based on an apparent desire to achieve a particular result, typically to suppress the allocation of costs to a particular sub-group of customers. Revenue requirement allocation should, in this case, be based on cost of service and cost causation and the promotion of efficiency to benefit all customers. The Commission rejects the invitation to create additional subsidies and distortions.

b. Embedded Cost Study

The Order concludes that ComEd's embedded cost study was prepared properly and rejects the objections to the study raised by IIEC and GCI. While ComEd agrees with these

conclusions, adoption of a marginal cost based rate design based on ComEd's marginal cost study, as suggested in the proposed Commission Analysis and Conclusion for Section II.F.1.a., requires a corresponding revision to the first sentence of the Commission Analysis and Conclusion appearing on page 121 of the Order:

> Although the Commission has approved ComEd's marginal cost based rate design based on ComEd's marginal cost study, the Commission finds that the ~~accepts the~~ embedded cost ~~methodology~~ study provided by the Company, as modified and corrected in its rebuttal and surrebutal testimony, was properly performed.

2. Interclass Revenue Allocation

Section II.F.2 of the Order describes the "across the board" revenue allocation proposal made by IIEC and Trizechahn, which the Order rejects on page 122. The record strongly supports the rejection of this proposal, and the Order would be enhanced if a summary of some of the reasons for the rejection were included. ComEd's Exceptions reflect such language.[†]

G. Rate Design

The introductory paragraph to Section II.G (Order at 122) identifies those rate design issues that must be resolved in order to set residential delivery services rates. A minor revision should be made for consistency with the Order's disposition of issues related to Rider TS.[†] In addition, ComEd would request that the Order expressly confirm ComEd's understanding that ComEd may update its distribution loss factors for non-residential customers, which are lower for all non-residential classes and which were opposed by no party, in advance of the final Order.

[†] As stated in the testimony of Ms. Juracek, a marginal cost based allocation is correct, but ComEd would accede in the proceeding to a Commission order using its ECOSS for this purpose only. (Juracek Dir., ComEd Ex. 1.0, pp. 15:405-17:436). In no event is an "across the board" allocation warranted.

[†] ComEd takes no exception to the ALJs' selection of the rate design issues that must be decided in the Interim Order, and agrees (as do the other Joint Movants) that Rider TS issues are among them.

(Born Dir., ComEd Ex. 17.0, pp. 8:149-10:196 and ComEd Exs. 17.1, 17.2; Alongi-Kelly Dir., ComEd Ex. 13.0 CR, pp. 38:846-39:851 and Att. C at 2nd Revised Sheet Nos. 130, 131).

> Many rate design issues raised in this Docket need not be resolved in this Interim Order. No party contested ComEd's proposed design of residential delivery services rates themselves nor its residential and updated non-residential distribution loss factors ("DLFs"). In addition, ~~five~~six rate design issues -- Rider ISS pricing, residential customer eligibility for the power purchase option, the methodology for calculating the single billing option ("SBO") credit, the methodology for calculating metering charges, proposed Rider TS, and the minimum duration on bundled rates for residential delivery service customers who return to bundled rates -- should be addressed in this Interim Order. ComEd also may reflect in its tariffs its updated non-residential DLFs in advance of the final Order. The remaining rate design issues that have been raised -- such as the issues relating to demand ratchets, billing demand definition, standby service, generators as delivery service customers, high voltage customers, ~~proposed Rider TS,~~ and existing Rider 25 -- will be addressed in the final Order.

2. Residential Customer Eligibility for Rider PPO

The Order (at 126) correctly notes that ComEd is not required under the Act to offer PPO service to residential customers. However, the finding appears to contain language discussing Rider SBO. To correct this clerical error and make the Commission's finding clear, ComEd suggests that this Section of the Order be revised as follows:

> Under the Company's proposal, residential customers ~~with past due bundled services balances owed to ComEd are precluded from being placed on the SBO and from receiving the SBO credit~~ are not eligible customers under ComEd's proposed revised Rider PPO and, thus, may not elect the Power Purchase Option. ComEd states that this is appropriate because an electric utility is not legally required to offer the power purchase option to residential customers. 220 ILCS 5/16-110. No party argues to the contrary. The Commission finds that ComEd correctly interprets the requirements of the Act in this regard and, therefore, accepts ComEd's position.

3. SBO Credit

The Order errs in directing that the SBO credit be calculated using long-term average embedded costs. Both the law and the evidence require that the credit be based on ComEd's net avoided costs -- the full cost that ComEd actually avoids when a customer goes on Rider SBO.

The Act does not expressly call for, or authorize, an SBO credit. The Act, however, does specifically mandate that: "Charges for delivery services shall be cost based, and shall allow the electric utility to recover the costs of providing delivery services through its charges to its delivery service customers that use the facilities and services associated with such costs. Such costs shall include the costs of owning, operating and maintaining transmission and distribution facilities."[†] 220 ILCS 5/16-108(c). The SBO credit therefore is appropriate, and lawful, if and only if it is designed so that it neither overstates nor understates the net costs that will be saved by ComEd when RESs place customers on the SBO. This conclusion is not subject to a debate about matters of policy or theories; it flows directly from the Act. If ComEd is required to give a credit greater than its savings, ComEd cannot recover its costs under the rate, and the rate is unlawful. [‡] It is that simple.

The embedded cost methodology for setting the SBO credit thus is wrong, because it is erroneous and violates Section 16-108(c) in four *different* respects: (1) it is undisputed that the embedded cost methodology overstates the costs that ComEd will save in the economic short

[†] Section 16-118(b) of the Act, 220 ILCS 5/16-118(b), states in part that: "The tariff filed pursuant to this subsection may also include other just and reasonable terms and conditions." However, nothing in that general language of Section 16-118(b), which does not even mention the notion of an SBO credit, can possibly be read as authorizing an SBO credit that is inconsistent with the specific mandates of Section 16-108(c).

[‡] Theoretically, the revenue shortfall could be made up by spreading it among all other customers, something which none of the parties advocating the embedded cost approach thus far has proposed, and that no evidence supports. In any event, doing so would an unnecessary and inappropriate cross subsidy that violates the principle of assigning costs in accordance with cost causation, as the above cited evidence, among other things, shows.

term when customers are placed on the SBO; (2) the embedded cost methodology overstates the costs that ComEd will save even in the economic long term because that methodology, without foundation, erroneously assumes that all customers will be placed on the SBO in the long term and/or that ComEd's long term savings are directly proportional to the percentage of customers placed on the SBO; (3) the embedded methodology also overstates the costs that ComEd will save because it ignores ComEd's obligation to stand ready as the billing "provider of last resort" under Section 16-103 of the Act, 220 ILCS 5/16-103; and (4) even supposing that the embedded cost methodology were absolutely correct in reflecting what will be ComEd's savings in the economic long term, that methodology and the associated rate design established by the Order provide no mechanism by which ComEd may recover the undisputed revenue shortfall that will occur in the short term. (*E.g.*, Swan Reb., DOE Ex. 2.0 CR, p. 20; Gordon Dir., ComEd Ex. 2.0, pp. 17:460-25:676; Clair-Crumrine Dir., ComEd Ex. 12.0 CR, pp. 19:431-20:457, 41:930-42; Makholm Dir., ComEd Ex. 15.0, pp. 2:43-3:81, 8:234-11:332; Gordon Reb., ComEd Ex. 21.0, pp. 7:154-9:213; Clair-Crumrine Reb., ComEd Ex. 31.0 CR, pp. 2:30-3:68; Makholm Reb., ComEd Ex. 34.0, pp. 1:1-7, 1:12-3:65, 4:89-10:243; Gordon Sur., ComEd Ex. 44.0, pp. 4:110-6:160; Clair-Crumrine Sur., ComEd Ex. 49.0 CR, p. 5:101-13; Makholm Sur., ComEd Ex. 55.0 CR, pp. 1:18-26, 3:57-14:338; ComEd Init. Br. at 124-27; ComEd Reply Br. at 86-90).

ComEd, in its direct case, proposed an SBO credit of $0.03 (three cents), further providing that customers would not be entitled to the credit while they had a past due bundled service balance. (Alongi-Kelly Dir., ComEd Ex. 13.0 CR, pp. 38:827-41 and Att. C at 1st Revised Sheet Nos. 176 and 122.2). ComEd's proposal in its direct case was based on its calculation of the net costs that ComEd actually will avoid due to customers electing the SBO, except that ComEd noted that the $0.03 figure actually overstated the savings because it did not

factor in the extra costs that ComEd incurs due to the manual work-around (relating to outstanding bundled balances) that has been the least cost approach to implementing the Commission's order relating to the SBO in Commission Docket No. 00-0494.† (Alongi-Kelly Dir., ComEd Ex. 13.0 CR, pp. 8:165-67, 38:827-44 and Att. O). In its rebuttal case, ComEd demonstrated based on further analysis that its original calculation also otherwise overstated ComEd's savings and that, if correctly calculated on a net avoided cost basis, the SBO credit actually would be negative $0.02; however, ComEd did not propose to reduce the credit from $0.03. (Alongi-Kelly Reb., ComEd Ex. 32.0, pp. 24:499-25:521 and Att. F). ComEd also showed that the costs of the work-around amounted to approximately $225.00 per account†, or $4.58 per month if spread over a 60 month period and subjected to appropriate interest and annuity calculations. (*Id.*) ComEd also showed that the SBO credit, if calculated on an embedded cost basis, which exaggerates ComEd's actual savings, would be $0.28 (twenty-eight cents), before factoring in the costs of the work-around. (*Id.*) If the Commission were to adopt the embedded cost based approach, then ComEd would be entitled to deduct the costs of the work-around (unless, as the Order recommends, the Commission determines that customers with outstanding undisputed bundled services balances will not be eligible for the SBO). ComEd does not waive its right to that deduction.

The idea that ComEd theoretically will experience material savings in the short run or the long run by virtue of the SBO also is undercut by another undisputed fact. ComEd's ability to

† The Order correctly approves ComEd's revised proposal (revised in light of certain Staff testimony) that customers with unpaid undisputed bundled services balances not be eligible to be placed on the SBO. (Order at 140). (*See* Section III.A, *infra*).

† $225.00 is the amount required if every non-residential SBO customer were to pay the fee; if only customers with an undisputed bundled services balance pay this fee, the calculated fee would be $1,125.00, based on 20% nonresidential customers with a bundled services balance. (*See* Alongi-Kelly Reb., ComEd Ex. 32.0, Att. F, n.3).

avoid any short-run costs is extremely limited, as the long list of citations earlier in this discussion shows. (*E.g.*, Gordon Dir., ComEd Ex. 2.0, pp. 20:536-22:594; Gordon Reb., ComEd Ex. 21.0, pp. 8:191-9:213). Moreover, even though the current SBO credit is based on an embedded cost methodology and thus is inflated, RESs have placed only approximately 5% (based on recent data) of delivery services customers on the SBO. (Clair-Crumrine, Tr. 1119:19-1120:3). If only some customers elect to take delivery services, and if only a fraction of them are placed on the SBO, then obviously ComEd's opportunity to avoid fixed costs or long term variable costs by virtue of the SBO is non-existent or negligible, even in the long run. And, even if the embedded credit were fair in the economic long term (which it is not), the Order cannot come to grips with the fact that an embedded credit provides ComEd with no mechanism by which it may recover the revenue shortfall it will incur during the years, or even decades, before the long-term arrives.

ComEd's advocacy of a net avoided cost based SBO credit is in no way inconsistent with the decision of the Appellate Court in the appeal from the Commission's Order in Docket No. 99-0117. While that court affirmed the Commission's order of an embedded cost based SBO credit based on the evidence in the record in that proceeding, it also stated that: "ComEd correctly notes that the 'embedded cost' methodology fails to account fully for ComEd's short term costs, the Commission accepted its staff's conclusion that the 'embedded cost' methodology is 'cost based' in that it reflects ComEd's costs over the long run." *Commonwealth Edison Company v. Illinois Commerce Commission,* 322 Ill. App. 3d 846, 854, 751 N.E.2d 196, 203 (2d Dist. 2001). As shown above, the theory that an embedded cost based SBO credit fairly reflects ComEd's long run savings now even more plainly is untenable, even setting aside that it was analytically unsound to begin with due to the theory's inherent methodological flaws and its

disregard of ComEd's "provider of last resort" obligation. (ComEd Reply Br. at 86-90). ComEd's proposed SBO credit is more than generous (it plainly is overstated). Even supposing that the Commission did not err on this subject in Docket No. 99-0117, the evidence in this proceeding and the law do not permit the Commission to approve an embedded cost based SBO credit. The evidence and the law permit only a net avoided cost based SBO credit.

The Order also concludes that the net avoided cost methodology will have a "depressing effect on" the willingness of RESs to place customers on the SBO. (Order at 130). Within the confines of the law, if a properly calculated SBO credit causes RESs or customers to make economically rational decisions, then that is exactly what should happen, and if it is the RESs' economically rational decision not to place delivery customers on the SBO then so be it. There is nothing in the Act or the evidence that suggests that the Commission must or should "put its thumb on the scales" so as to encourage RESs to use the SBO more. A desire to promote single billing by inflating the SBO credit is not a lawful reason to violate the cost based rates and full cost recovery mandates of Section 16-108(c). Moreover, the subsidy does not work -- the record is clear that, even with an inflated SBO credit, RESs have placed only approximately 5% of delivery services customers on the SBO.

Finally, the embedded cost methodology does not, as the Order suggests, "ensure that customers pay only for costs they incur." (Order at 130). It ensures that customers on the SBO will get a credit that results in them underpaying for the costs they cause, at the expense of ComEd and its shareholders or, if, hypothetically the rate design spread the revenue shortfall to other customers, at the expense of those other customers. Indeed, the embedded credit entirely frees SBO customers from paying for the costs of maintaining a billing system that can service them if they choose to return and forces those costs to be unfairly borne by others.

The Commission Analysis and Conclusions paragraph on page 130 should therefore be deleted and replacement language be adopted as follows:

> The Commission must render its decision based exclusively on the evidence in the record. The evidentiary record in this docket on the subject of the SBO credit is far more extensive than in Docket No. 99-0117 and reflects actual conduct and actual costs in relation to the SBO. Whatever the merits of marginal cost ratemaking versus embedded cost ratemaking in general, the evidence here shows than an embedded cost basis SBO credit will in fact be an inflated credit and that ComEd is not being provided with a mechanism by which it may recover the resulting revenue shortfall. ComEd's net avoided cost basis credit, while small, is overstated at that. Assertions that an embedded cost basis credit are essential to competition in general or as to unbundled billing in particular are not credible.
>
> The Commission finds that ComEd properly calculated the amount of the credit based on the net costs that ComEd will avoid when RESs elect the single bill option and that an 'embedded cost' methodology fails to account fully for ComEd's short term costs. Accordingly, the Commission rejects Staff's proposals to use an embedded cost methodology. The Commission also rejects Staff's proposal concerning customers with past due bundled services balance eligibility for SBO.

4. Metering Service Charge (Credit)

The Order (at 132) errs in directing that the meter service charge be set using long-term average embedded costs.[†] Both the law and the evidence require that the difference between the rates charged to customers taking metering service from ComEd and those taking the service from other suppliers be based on ComEd's actual cost savings when a customer selects another

[†] The Commission, in Docket No. 99-0013, ordered electric utilities to unbundle metering service, and to pass on the savings that utilities would in theory enjoy when a customer elects unbundled metering service. However, the Commission directed that the rates not include a "credit" for this amount *per se*, but instead that the "savings" be reflected through lower customer charges for customers taking unbundled metering service. Thus, ComEd's existing Rate RCDS reflects what in substance are unbundled metering service credits through lower standard charges for customers electing unbundled metering service. (Ill. C. C. No. 4, 3rd Revised Sheet Nos. 116 and 117, and Original Sheet No. 117.1). Although ComEd believes that expressing the "savings" as credits would be preferable, ComEd has adhered to the "charges" approach in its proposed revised Rate RCDS. However, ComEd renews its position that the amount of the difference must be determined on a net avoided cost basis, regardless of whether it is implemented as a credit or a reduced charge, and ComEd's proposed standard metering charges are calculated on this basis.

supplier. In addition, the language of the Order inadvertently is ambiguous, and thus, even if the intended ruling were not to be altered, the language should be clarified.

The savings included in the standard metering charges must be calculated based on the net costs that ComEd will actually avoid when a customer elects unbundled metering service. If the implicit credit is larger (for example, because the "savings" are based on an average of the total metering cost per customer), ComEd cannot recover its metering costs. The embedded cost approach overstates the savings that ComEd incurs because it inherently assumes that ComEd will experience more savings than ever will actually occur in either the economic short term or the economic long term, for incontrovertible factual reasons. This is particularly true given ComEd's obligations as a "provider of last resort" ("POLR") for standard metering service under Section 16-103 of the Act, 220 ILCS 5/16-103, which do not allow ComEd to shed all related costs, even in the long term, when a customer leaves. The embedded cost approach therefore, improperly denies ComEd cost based rates and full recovery of its costs of providing delivery services (as it does under the rate design approved by the Order), 220 ILCS 5/16-108(c).[†] (*E.g.*, Gordon Dir., ComEd Ex. 2.0, pp. 17:460-25:676; Clair-Crumrine Dir., ComEd Ex. 12.0 CR, pp. 19:431-20:457, 28:639-29:661; Makholm Dir., ComEd Ex. 15.0, pp. 2:43-3:81, 8:234-11:332; Gordon Reb., ComEd Ex. 21.0, pp. 7:154-9:213; Clair-Crumrine Reb., ComEd Ex. 31.0 CR, pp. 2:30-3:68; Makholm Reb., ComEd Ex. 34.0, pp. 1:12-3:65, 4:89-10:243; Gordon Sur., ComEd Ex. 44.0, pp. 4:110-6:160; Clair-Crumrine Sur., ComEd Ex. 49.0 CR, p. 5:101-13; Makholm Sur., ComEd Ex. 55.0 CR, pp. 1:18-26, 3:56-14:338; ComEd Init. Br. at 127-29; ComEd Reply Br. at 90-92).

[†] Hypothetically, ComEd's revenue shortfall could be made up through increased rates charged to other customers (something which none of the parties advocating the embedded cost approach thus fare has proposed). This would require customers not electing unbundled metering service to pay cross subsidies to those who do, contrary to the principle of "cost causer pays" and contrary to Section 16-108(c).

Nonetheless, several parties, including Staff, continue to argue for an embedded cost approach. The above discussion shows that their positions are wrong, factually and legally, and their arguments were fully refuted in detail in ComEd's Reply Brief. (ComEd Reply Br. at 90-92). Foremost among these arguments is the notion that ComEd will supposedly experience savings materially greater than the actual avoided costs. Quite the opposite is true. ComEd's POLR costs remain unchanged, regardless of how many customers take unbundled service. Moreover, even though the current standard metering service charges (credits) are based on an embedded cost methodology, and are thus inflated, no delivery services customers have elected unbundled metering service. (Clair-Crumrine, Tr. 1119:7-13). If only some customers elect to take delivery services, and if none or only a fraction of them elects unbundled metering service, then obviously ComEd's opportunity even in the economic long run to avoid fixed costs or long term variable costs by virtue of the offer of unbundled metering service is non-existent or negligible, and its ability to avoid any short run costs is extremely limited.

The need to base standard metering charges (credits) on net avoided costs is entirely consistent with the decision of the Appellate Court in the appeal from the Commission's Order in Docket No. 99-0013. While the court affirmed the Commission's embedded cost based standard metering service charges, based on the evidence in that record, the Court relied upon its opinion in the appeal from the Commission's Order in Docket No. 99-0117, and stated that: "Furthermore, although we agreed that the [embedded cost] methodology 'fail[ed] to account fully for ComEd's short term costs,' we deferred to the Commission's conclusion that the methodology 'reflect[ed] ComEd's costs over the long run.'" *Commonwealth Edison Company v. Illinois Commerce Comm'n*, No. 2-00-1397, slip op., p. 7 (Ill. App. Ct. 2d Dist. 2001) (S. Ct. R. 23 Order). As shown above, the theory that embedded cost based standard metering service

charges (unbundled metering service credits) fairly reflect ComEd's long run savings cannot be supported based on the evidence in this record. It has been shown to be unsound and to not only have inherent methodological flaws, but to ignore entirely the costs of ComEd's provider of last resort obligation, which remains unchanged even in the long term. Even supposing that the Commission did not err in Docket No. 99-0013 on this subject, the evidence in the record in this proceeding and the law do not permit the Commission to approve an embedded cost based approach and the Order's rationale, "that the Company has failed to produce evidence to support a conclusion contrary to our determination in Docket 99-0013" (Order at 133) simply cannot stand in view of the evidence.

Finally, the record shows that ComEd properly and correctly calculated the standard metering charges (unbundled metering service credits) on a net avoided cost basis. (Alongi-Kelly Dir., ComEd Ex. 13.0 CR, pp. 8:168-69, 31:686-32:702 and Att. P). Some intervenors assert that ComEd has not made correct calculations here, but their assertions are erroneous. (Alongi-Kelly Reb., ComEd Ex. 32.0, pp. 22:463-24:497; Alongi-Kelly Sur., ComEd Ex. 50.0 CR, pp. 1:19-2:30, 10:194-11:213).

ComEd accordingly requests that the first full paragraph on page 133 be deleted, as indicated in ComEd's Exceptions, and that replacement language be adopted as follows:

> The Commission finds ComEd's calculation of the standard metering charges (unbundled metering service credits) using a net avoided cost methodology to be consistent with the evidence and the Act's directives regarding cost based rates and full cost recovery, and the principle of "cost causer pays", and ComEd's approach is, accordingly, just and reasonable, and should be adopted.

In the alternative, assuming *arguendo*, that the Order could lawfully approve an embedded cost based approach (which it cannot), the Order arguably is ambiguous in that it could be read to prevent the updating of the embedded cost based charges adopted in Docket No

99-0013. (Order at 133). ComEd does not believe that this is what the Order intends. The Order should, therefore, in any event be clarified to permit the use of updated embedded costs by deleting the first full paragraph on page 133 and substituting replacement language as follows:

> The Commission rejects the Company's proposal to revise the metering service provider credit methodology in this proceeding for residential customers. The charges should be ~~updated~~ set using the embedded cost approach and ComEd's embedded cost calculations.

5. Rider TS – Transmission Service

ComEd's proposed Rider TS accomplishes three things, as the Order notes:

- Rider TS appropriately passes through to retail customers who take unbundled power and energy from ComEd in addition to delivery services (*i.e.*, customers under Riders PPO and ISS) RTO transmission services costs paid by ComEd on their behalf. (Proposed Rider TS Sheet Nos. 218-19; *see also* Alongi-Kelly Dir., ComEd Ex. 13.0 CR, pp. 6:126-7:139, and Att. E; Clair-Crumrine Dir., ComEd Ex. 12.0 CR, p. 31:710-17; Clair-Crumrine Reb., ComEd Ex. 31.0 CR, pp. 23:525-24:533; Clair-Crumrine Sur., ComEd Ex. 49.0 CR, p. 19:424-34).

- Rider TS credits unbundled retail customers' CTCs with the costs of transmission services and ancillary transmission services imposed under the RTO tariff. (Proposed Rider TS Sheet Nos. 218-19; Alongi-Kelly Dir., ComEd Ex. 13.0 CR, Att. G; Clair-Crumrine Dir., ComEd Ex. 12.0 CR, p. 31:718-24).

- Rider TS allows ComEd to use its billing and collection system to recover overdue transmission charges due an RTO. (Proposed Rider TS Sheet Nos. 218, 221). ComEd gains no financial benefit from this proposal, but offered it in order to reduce overall collection costs and promote efficient retail competition. (Sterling Reb., ComEd Ex. 36.0, pp. 2:41-3:50. Clair-Crumrine Dir., ComEd Ex. 12.0 CR, pp. 31:725-32:733; *see also* Sterling Dir., ComEd Ex. 16.0, p. 28:591-603).

The Order approves Rider TS insofar as it performs the first two functions, with the caveat -- proposed by Staff and accepted by ComEd in its testimony -- that Rider TS be effective only upon the effective date of an RTO Open Access Transmission Tariff ("OATT"). However, because the Order rejects the third portion of Rider TS, ComEd respectfully submits that this finding is in error, and that ComEd's proposal should be accepted.

The Order's principal basis for rejecting Rider TS is its conclusion that "Given the current ability of ComEd to impose credit security requirements on RESs who apply for transmission service under ComEd's OATT, we find the Company's proposal unnecessary." (Order, p. 137). ComEd respectfully submits that this is a *non sequitur*. ComEd never argued that it lacked adequate credit security rights under the OATT or Illinois law. Nor did ComEd argue that an RTO would lack adequate credit security rights. Rather, the purpose of this portion of Rider TS is to provide the RTO with a lower-cost, practical alternative to the rights that it has to demand potentially large and expensive bonds or other security from RESs. By providing a cost-effective way for RTOs to rely on the credit of the underlying customers -- from whom the RTO is entitled to collect transmission charges under federal law -- ComEd's proposal also reduces the need of RTOs to impose independent wholesale credit requirements on RESs. (Sterling Reb., ComEd Ex. 36.0, pp. 2:44-3:50, 4:87-92, 5:112-6:125; Sterling Dir., ComEd Ex. 16.0, pp. 27:578-28:603). While ComEd strongly agrees with Staff that RESs should be financially sound, there is no reason to impose needlessly-high credit security requirements on RESs simply because the only alternative -- for the RTO to sue customers individually -- is impractical and expensive. From a policy perspective, allowing the RTO to use ComEd's existing retail billing system to collect unpaid transmission charges avoids this dilemma and promotes efficient competition.

To the extent that the Proposed Order relies on any of the other arguments offered by Staff, GCI, or the IIEC, it should also be revised. In particular:

- Staff argues that ComEd's proposal creates additional liability for retail customers. (Order at 134). GCI makes a similar argument. [†] Staff and GCI err. All ComEd's proposal allows is for ComEd to continue using its billing and

[†] IIEC, however, acknowledges that ComEd's tariff is "a conduit for the recovery of FERC charges." (~~Proposed~~ Order, p. 135; IIEC Init. Br. at 36).

collection system to recover these charges on behalf of an RTO, once that RTO replaces ComEd as the transmission provider. It does not add to the customers' liability. Under the OATT and federal law, transmission customers -- which include retail end users -- are directly liable to the transmission provider for the service. (Sterling Reb., ComEd Ex. 36.0, p. 4:75-81; Sterling Sur., ComEd Ex. 56.0, pp. 2:29-33, 4:76-79; Sterling Tr. 2357:1-6).[†] The Commission inherently recognized this fact in its Order in ComEd's original delivery services rate case. (*Commonwealth Edison Co.*, Docket No. 99-0117 (August 26, 1999), pp. 151-52). GCI witness Bodmer acknowledged this. (Tr. 1919-20). Moreover, the Commission cannot alter that liability. (Sterling Reb., ComEd Ex. 36.0, pp. 2:36-4:81; Sterling Tr. 2356:17-2357:7, 2370:18-2371:4).

- Staff argues that ComEd's proposal is unnecessary "when so many other measures are in place to protect the transmission provider against a transmission customer's default." (Order at 134). Staff simply misses the point. ComEd does not argue that its proposal is necessary to allow an RTO to protect itself again credit risk. As Staff says, the RTO will have several mechanisms to do this. Staff essentially acknowledges this by actually arguing that an RTO "can charge bad debt expense to all transmission customers (RESs or other entities) on a monthly basis when a transmission customer defaults on payments." (Order at 134). Rather, ComEd's proposal is to allow the RTO to collect unpaid tariffed charges as efficiently and inexpensively as possible, reducing credit and collection costs for all. (Borden, Tr. 2281:16-2284:1; Sterling Reb., ComEd Ex. 36.0, pp. 2:41-3:50, 4:75-92). GCI likewise acknowledges this when they "note[] that even without the proposed DST provisions, the transmission provider has at least two parties to which it can look for payment: the transmission customer and the retail customer." (Order at 136). It should be the Commission's goal to reduce the imposition of bad debt expense on other, innocent customers. It should likewise be the Commission's goal to reduce the overall collection of legitimate delivery services charges. ComEd's proposal not only reduces total costs of collection, which are ultimately borne by customers, but also promotes efficient retail competition. Borden, Tr. 2281:16-2284:1; Sterling Reb., ComEd Ex. 36.0, pp. 2:41-3:50, 4:75-92.

- IIEC questions the jurisdiction of the Commission to approve ComEd's proposed Rider TS, expressing concern "about whether ComEd, in the context of a state jurisdictional tariff, could mandate whether a retail customer or ARES serving a retail customer would be liable for transmission service charges." (Order at 135). ComEd would share this concern were the characterization of its proposed tariff

[†] Staff's related argument that retail customers should not be liable for transmission charges is equally beside the mark. Under federal law, they are -- as are all other transmission customers. (Sterling Reb., ComEd Ex. 36.0, p. 4:75-81; Sterling Sur., ComEd Ex. 56.0, pp. 2:29-33, 4:76-79; Sterling Tr. 2357:1-6). The Commission has no jurisdiction to alter the OATT. 220 ILCS 5/16-108(c). Nor can the Commission, under state law, compel ComEd or any other utility to offer transmission delivery services directly to RESs. Under the Act, delivery services are offered to retail customers. 220 ILCS 5/16-104.

accurate. Rider TS does not add or subtract from the liability of any customer for transmission charges. It simply allows ComEd to collect on behalf of an RTO. It is undisputed that these are delivery services charges and nothing prevents this Commission from allowing a utility to collect these charges on behalf of the transmission provider. Indeed, were IIEC's concern valid, the state would have no jurisdiction to direct single billing (*e.g.*, under Rider SBO) of transmission charges either. This is clearly not the case.

For these reasons, ComEd recommends that the second paragraph on page 137 of the Proposed Order be revised as follows:

> The Commission ~~rejects~~ also accepts ComEd's proposed tariff provisions which allow it to bill retail customers for transmission delivery services provided by ~~the~~ an RTO. ~~We agree with the assertions of Staff, GCI and IIEC regarding ComEd's proposal. Given the current ability of ComEd to impose credit security requirements on RESs who apply for transmission service under ComEd's OATT, we find the Company's proposal unnecessary.~~ This provision is not designed to benefit ComEd, or to provide it with any additional revenue. Nor, contrary to the assertions of Staff, GCI, and IIEC, does it increase the liability to retail customers for transmission charges. This rate applies only to transmission charges which, under the OATT, are already applicable to retail customers. Rather, the record shows that the proposal offers an opportunity to reduce the credit security costs of RESs by providing an RTO with an efficient and cost-effective means of billing and collecting such charges, reducing substantially the need for wholesale-type credit security. It is not to the benefit of customers as a whole either to increase credit requirements imposed on RESs beyond those that otherwise would be applicable under Illinois and federal law, or to increase the costs of collecting obligations of customers under federal law. Since the proposal does not harm customers, does not increase ComEd's costs, and may reduce costs to both customers and RESs, it should be approved.

III.
Terms and Conditions Issues

A. SBO Credit Eligibility (Customers With Past Due Bundled Service Balances)

The Order discusses SBO eligibility on pages 138-140, but does not identify the amendments that ComEd made to its original proposal. ComEd proposes a clarification to the "Commission Analysis and Conclusion" section on page 140.

B. Enrollment Issues

1. Electronic Signatures

On pages 141–42, the Order discusses the possibility that RESs may ask customers to electronically "sign" the letter of agency ("LOA") that a RES is required to obtain for switching purposes under the Act and Section 2EE of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2EE. The Order recognizes that there are many unresolved issues surrounding use of electronic signatures on LOAs, including the fundamental legal questions of whether and, if so, under what circumstances (what are the legal prerequisites under which) electronic signatures on LOAs are lawful (valid and binding) under the Illinois or the federal electronic signature statutes, 5 ILCS 175/1-101, *et seq.*; Electronic Signatures in Global and National Commerce Act, S. 761, Pub. L. 106-229, 114 Stat. 464, Section 101(c) (June 30, 2000), as well as many practical questions. (Order, pp. 140-42). The Order states in part: "While ComEd has some concerns about the use of electronic signatures (including their legality given the current wording of various applicable statutes), it is [*sic*] does not appear to be opposed to them in the abstract." (*Id.* at 141). The Order directs that the parties begin workshops "…with the understanding that they should arrive at a process to implement electronic signatures." (*Id.*) The Order's discussion's completeness and precision would be enhanced by the addition of certain additional information.

ComEd is amenable to working with Staff and other interested parties in workshops to explore the various legal and practical issues surrounding use of electronic signatures for LOAs. ComEd wishes to make clear, however, that while ComEd is amenable to the use of electronic signatures for LOAs if legal and practical, ComEd should not face legal or business risks as a result of a RESs' decision to rely on an electronically signed LOA. While ComEd receives a Direct Access Service Request (DASR) from a RES, ComEd never sees the underlying LOA

except in the occasional case when a dispute arises about the LOA. (The RES is obligated to retain the LOA on file for two years and to produce the LOA if its validity is at issue.) Thus, if a RES were to use an electronically signed LOA, ComEd would have no way of knowing that the RES had done so, unless the RES or the customer affirmatively informed ComEd. Yet, if the customer later disputed the validity of the LOA on the ground that it was electronically signed, ComEd could face a complaint that it should not have acted on the DASR because the underlying LOA was invalid, even though ComEd had no knowledge that an electronically signed LOA was used, much less any involvement in its use. It is only just and reasonable, therefore, that any arrangements made for the use of electronically signed LOAs should adequately protect ComEd from any risks resulting from the RESs' decision to do so.

In addition, while the lawfulness of electronic signatures on LOAs and the legal prerequisites for their use are matters that the parties usefully may discuss in workshops, they are not matters that the parties may decide in the sense that the Commission or a court decides an issue. Given the as yet uncertain state of the law and utilities' conceivable exposure, ComEd cannot reasonably be expected to rely entirely on the informal non-public opinions of other parties in workshops as to whether, and under what conditions, electronic signatures on LOAs are lawful. Whether electronic signatures on LOAs may be legal under state law and, if so, what prerequisites must be met for electronic signatures on LOAs to be legal under state law, are questions that are more properly answered by the constitutional officer charged with enforcing the Section 2EE. ComEd therefore suggests that the Commission request that the Illinois Attorney General render an advisory opinion on the state law issues at hand. *See* 15 ILCS 320/7.

Moreover, even they are valid in principle, identifying the specific prerequisites for a valid electronic signature is a separate task -- and one that is largely overlooked. Under the

federal law, in particular, a RES must meet a number of prerequisites that may prove to be burdensome, perhaps prohibitively so. Given the numerous prerequisites, the parties may or may not be able to agree on a practical process that will result in the lawful use of electronic signatures. Moreover, ComEd should not be forced to police the validity of LOAs or the RESs' compliance with these requirements but, rather, must be able to rely upon a RES's submission of a DASR as a RES's representation and warranty that it has complied with all applicable laws and regulations required to switch a particular customer. To expect ComEd to police LOAs would be burdensome both to ComEd and the RES, and unfair at least as to ComEd and perhaps also as to the RES. ComEd should not be at risk if a RES directs a switch based upon an LOA that is later revealed to be invalid because it was electronically signed (or, for that matter, for any other reason not in ComEd's control).

Based upon the foregoing, the relevant "Commission Analysis and Conclusion" (the last full paragraph on page 141 carrying over to the top of page 142) should be modified as follows:

> The Commission notes that several parties have raised the issue of whether in principle and, if so, under what circumstances ~~ComEd should permit~~ electronic signatures (as compared to "wet" signatures) ~~to~~ may be valid for customers "signing" an LOA. We also have considered the Company's response to this proposal. Based on those differing opinions, we agree with MidAmerican's suggestion, that this issue might be better ~~resolved~~explored in a workshop process and that such a process be initiated for interested parties. While ComEd has some concerns about the use of electronic signatures (including their legality given the current wording of various statutes and the specific prerequisites for legal validity), it ~~is~~ does not appear to be opposed to them in the abstract. We are confident that the Company would be willing to work with Staff and the other parties in workshops to ~~resolve~~explore various issues surrounding their use. ~~This would permit the parties a chance to resolve this matter informally.~~ Thus, we direct the parties to begin the workshop process with the understanding that they should ~~arrive at~~identify and discuss issues of concern in developing a process to implement electronic signatures.
>
> The Commission recognizes, however, that the parties cannot unilaterally decide whether, and under what conditions, electronic signatures on LOAs are lawful. Therefore, the Commission will be seeking an advisory opinion from the Illinois Attorney General to determine whether electronic signatures on LOA's

are generally legal and, if so, what prerequisites must be met for electronic signatures on LOAs to be legal under state and federal law, respectively.

A RES, by sending ComEd a DASR, should be understood to represent and warrant that the RES has acted in compliance with all applicable federal and state statutes relating to the switching of a customer's provider of electric power and energy. ComEd is not responsible for policing RESs to ensure their compliance with such statutes, and ComEd shall not be subject to claims or penalties for switching a customer's provider of electric power and energy when the LOA purporting to authorize the switch is subsequently shown to be unlawful or otherwise invalid. Consistent with previous Commission orders and regulations, a RES need not provide an LOA directly to ComEd but, rather, shall maintain all LOAs on file for a period of two years, and shall be prepared to produce an LOA if its validity is called into question within that time frame.

2. Term of Service

This topic is covered in Section II.G.9.

D. Off-Cycle or Non-Standard Switching for Residential Customers

The Order at page 143 approves ComEd's proposal to prohibit off-cycle or non-standard switching by residential customers, but to permit such switching for residential ISS customers in certain circumstances. ComEd takes exception to the Order's description of the circumstances in which residential customers on Rider ISS may engage in off-cycle switching because it deviates in an important respect from ComEd's proposal. ComEd proposed to allow residential ISS customers to engage in off-cycle switching for a fee when doing so would not interfere with ComEd's normal business practices. (Clair-Crumrine Reb., ComEd Ex. 31.0, pp. 45:1036 - 46:1047). ComEd provided one example of a situation in which such switching would interfere with normal business practices – a "mass drop" of customers that takes place when a RES ceases to do business. However, ComEd did not limit its exception, as the Order does, to such "mass drop" situations. Accordingly, ComEd suggests that the Order be revised to conform to ComEd's proposal by amending the parenthetical on page 143 as follows:

The Commission finds that ComEd's proposal to limit switching for residential customers to the customer's regularly scheduled meter reading date, with an exception for residential ~~ISS~~ customers on Rider ISS (in circumstances in which such switching will not interfere with ComEd's normal business practices, including, but not limited to ~~other than those involved in~~ a "mass drop") who will be able to switch off-cycle for a fee, to be reasonable. The proposal is therefore adopted.

E. General Account Agency Issues

The Order reaches the correct conclusion, but should be supplemented to reflect ComEd's response to specious arguments of the ARES Coalition concerning agency law which are summarized for the first time in the Order. ComEd's proposal, which is also supported by Staff, governs ComEd's recognition of an agency relationship between a RES and a customer, and does so in a manner that implements important protections for both customers and utilities. ComEd's proposal imposes no unreasonable burdens (Clair-Crumrine Sur., ComEd Ex. 49.0 CR, p. 21:473-79) and is in no way contrary to Illinois law. ComEd's Exceptions contain language summarizing this response.

F. Value-Added Aggregation Services

The Order accurately summarizes ComEd's position that value-added aggregation services are not tariffed services. In order to clarify ComEd's position that it is not required to offer such services under the Act, ComEd recommends that the "ComEd Response" on page 145 of the Order be modified to read, "ComEd disagrees with Staff's recommendations, stating that the proposed services are not tariffed services ~~which it~~and that ComEd is not required to offer them under the Act…."

G. Collection of FERC Charges Under DSTs

This topic is covered in Section II.E.8.

IV.
Findings and Ordering Paragraphs

Finding (5)

Finding 5 of the Order, on page 145, sets the jurisdictional net rate base. As shown in Section II.C.3, *supra*, the rate base was inappropriately reduced. Finding 5 should therefore read:

> (5) for purposes of this proceeding, ComEd's net jurisdictional delivery services rate base is $4,018,471,000~~4,007,724,000~~;

Finding (6)

Finding 6 of the Order, on page 145, sets the jurisdictional delivery services revenue requirement. As noted in Section II.A, *supra*, the calculation of this revenue requirement included a small number of mathematical errors. Finding 6 should also be revised to reflect ComEd's exceptions. If the revenue requirement were calculated based on the existing rulings reflected in the Order, without revision for any party's Exceptions, the finding should read:

> (6) for purposes of this proceeding, ComEd's jurisdictional delivery services revenue requirement is $1,657,604,000~~1,649,844,000~~;

Based on the Schedule attached to ComEd's Initial Brief, and assuming the changes proposed in ComEd's Exceptions were implemented, the finding would be revised as follows[†]:

> (6) for purposes of this proceeding, ComEd's jurisdictional delivery services revenue requirement is $1,670,739,000~~1,649,844,000~~;

[†] The adjustments are: (1) employee layoffs ($8,096,000), (2) related payroll taxes ($648,000), (3) bill payment center closures ($765,000), (4) R&D disallowance, less the jurisdictional portion of the CHA special project specifically discussed in the Order ($3,529,000 - $1,174,000 = $2,355,000), plus (5) the related impacts on ComEd's uncollectible expense.

Finding (8)

Page 24 of the Order appropriately states: "As stated in the Finding and Ordering section of this Interim Order, said tariffs are final approved tariffs that are to go into effect May 1, 2002, and they do not require any further Commission action in order to go into effect." Page 27 appropriately states in part "the rates resulting from this revenue requirement will be neither temporary nor subject to refund…." However, apparently due to inadvertence, the Finding and Ordering section of the Order does not contain that language.

ComEd accordingly proposes that Finding "(8)" on page 146 be amended as follows:

> (8) the proposed revisions to ComEd's Delivery Service Tariffs and Riders, as modified by agreement during the course of these proceedings or as further directed in the prefatory portion of this Order, are hereby deemed to be just and reasonable, said tariffs are final approved tariffs not subject to refund and do not require any further Commission action in order to go into effect, and ComEd is directed to place these tariff sheets into effect and the tariff sheets shall be applicable to service furnished on and after the effective date, which shall be no sooner than five calendar days after the filing of tariffs in compliance with this order, and no later than the date provided by statute;

CONCLUSION

For the foregoing reasons, ComEd requests that the Order be modified as provided herein and in ComEd's Exceptions, and that the Commission enter the Order as so revised.

Dated: February 25, 2002

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: _____
One of the Counsel for
Commonwealth Edison Company

Paul. F. Hanzlik
E. Glenn Rippie
John L. Rogers
John P. Ratnaswamy
FOLEY & LARDNER
Three First National Plaza
Suite 4100
Chicago, Illinois 60602
(312) 558-6600

Anastasia M. O'Brien
Anne R. Pramaggiore
Associates General Counsel
Richard M. Bernet
Assistant General Counsel
EXELON BUSINESS SERVICES CORPORATION
10 S. Dearborn St.
Suite 3500
Chicago, Illinois 60603
(312) 395-5400